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THE CRIMINAL RESPONSIBILITY OF LUNATICS

A STUDY IN COMPARATIVE LAW

THESIS APPROVED FOR THE DEGREE OF DOCTOR OF LAWS IN THE UNIVERSITY OF LONDON

BY

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PREFACE

THE feud between medical men and lawyers in all questions concerning the criminal liability of lunatics is of old standing. More than one authority on either side has tried to bring about a reconciliation between the contending parties. But their endeavours have been crowned with very little success. For though it cannot be denied that the strife and warfare has of late lost much of its former bitterness, a *modus vivendi* satisfactory to both parties has not been found. Discouraged by such experiences, others have thought it well-nigh impossible to bridge over the gulf which in their opinion must ever separate the two hostile camps; they think that the visual angle from which the two professions look at the problem is too different to allow of a solution acceptable to both. I do not share this pessimistic view, nor the policy of the *laisser faire* which is its logical outcome. If all attempts hitherto made to bring the dispute to a peaceful ending have failed, and were doomed to failure from the very outset, the reason is not far to seek. Almost all the writers who have approached the investigation in a conciliatory spirit, have sought success by forsaking the claims of their own professional brethren and blindly recognising the opponents' claims; and surely deserters do not make good peace-makers. Yet in no other way could those writers hope to reach their goal. For how is the lawyer to distinguish between fact and hypothesis in the literature of psychological medicine? In no other branch of medical science

are there such vast tracts of *terra incognita;* and all of them the alienist fills with theories useful enough for his own purposes, but of no value to the practical criminologist to whom facts alone can serve as material to work upon. Even Sir James Stephen went astray here; for, accepting as gospel every word Dr. Maudsley has written upon the subject, he tried to insinuate into our rules of law the purely speculative opinions of that distinguished writer quite as much as the established facts of mental medicine which he had imbibed from the same source. On the other hand, the leaning, which some physicians have expressed, towards the views held by lawyers has too often been of a purely platonic character, unattended by any real insight into the legal principles embodied in such views, or inspired by a tendency to flirt with the doctrines of the anthropological school. How few of those medical writers, who express themselves satisfied with the existing rules, have a fair idea of what even that elementary notion 'criminal responsibility' really means! Messrs. Pitt-Lewis, Smith, and Hawke have chosen what naturally suggests itself as the most obvious means of escape from this difficulty, viz. co-operation of lawyer and physician. But their work strikes the reader as a mere juxtaposition of the opinions of the two classes of collaborators, followed by an attempt at compromise by mutual concessions. Though a truce may possibly be brought about in this way, deep and lasting peace will, I am afraid, not be concluded until a master mind, thoroughly familiar with both aspects of the question, brings to bear upon it the searchlight of criticism. Meanwhile, the author, though fully alive to his shortcomings, has in the following pages undertaken the task of applying what little legal knowledge he combines with a limited psychiatrical experience, to a critical study of the problem.

As regards the method of inquiry, an investigation from the standpoint of comparative jurisprudence appeared to hold out the best prospects. The material with which the legislator has to deal, is exactly the same in different countries; it can obviously not be material to the penal liability of a madman whether he claims to be 'The Saviour,' 'Le Sauveur,' 'Il Redentore,' or 'Der Heiland.' And though allowance has to be made for differences, in different legal systems, in the conception of crime itself, yet the spirit of the law is so much alike in states of Western European civilisation that the study of the provisions of foreign systems cannot fail, one should think, to supply with valuable hints both the critic and the would-be reformer of our own. The student of the foreign literature on the subject cannot push very far his researches before being struck by the very remarkable fact that in almost every country the same antagonism exists between law and medicine as that with which we are familiar in our own. What is here proclaimed by the medical profession as the royal road to salvation, is condemned with no uncertain voice by their colleagues in those states where that very postulate is realised in legislation, so that one feels tempted to ask with old Horace how it comes about—

> "ut nemo, quam sibi sortem
> Seu ratio dederit, seu fors objecerit, illa
> Contentus vivat? laudet diversa sequentes?"

The puzzle will find its solution as we proceed with a detailed analysis of the methods, adopted in different codes, of regulating the liability of the insane accused of crime.

The author knows only too well that his feeble powers will hardly enable him to do anything like justice to the subject upon the investigation of which he has embarked, and he cordially invites criticism. To one fault, however, he trusts

he need not plead guilty, viz. to the charge of having been carried away, in any part of this book, by either a medical or a legal bias.

In conclusion, the author gladly avails himself of this opportunity to express his gratitude for their kindness and courtesy in placing at his disposal those codes which were not accessible in any of the London libraries to their Excellencies the Ministers of Bolivia, Colombia, Guatemala, and Roumania; Count Mutsu of the Japanese Embassy; Mil. R. Vesnitch, Envoy Extraordinary of Servia in Paris; and the Peruvian Minister in Paris; as well as to Monsieur Berg, Juge d'Instruction in Luxembourg, and to Monsieur Ernest Eisenmann, Avocat in Paris.

5, Essex Court, Temple,
December, 1908.

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THE CRIMINAL RESPONSIBILITY OF LUNATICS.

CHAPTER I.

WHAT IS CRIMINAL RESPONSIBILITY?

"A man that seeketh precise truth has need to remember what every name he uses stands for, and to place it accordingly, or else he will find himself entangled in words, as a bird in lime twigs—the more he struggles the more belimed."—Hobbes, "Leviathan," Pt. I. Ch. IV.

"Men abuse speech when they register their thoughts wrong, by the inconstancy of the signification of their words."—*Ibidem.*

Sir James Stephen says: "Our leading principle, which should never be lost sight of, as it runs through the whole subject, is that judges in directing juries have to do exclusively with this question: Is this person responsible, in the sense of being liable, by the law of England as it is, to be punished for the act which he has done?" I must confess that I should prefer to state the question in a somewhat different form, viz. Is this person responsible, in the sense of being liable, by the law of England as it is, to be convicted of the crime with which he is charged? Conviction, not judgment, is the critical stage in the trial which fixes criminal responsibility. Even after conviction the prisoner may have "something to say why the court should not proceed to pass sentence upon him"; but whether sentence is passed or not is, so far as a question of responsibility is concerned, wholly immaterial. By being convicted the accused has been made responsible for his crime; nobody can be made twice responsible for the same crime, and it is the former conviction which bars a subsequent indictment for the

same offence: the plea "autrefois convict" is good whether judgment were given or not. I am, however, prepared to waive this somewhat technical objection and to accept Stephen's definition as sufficiently correct for our purpose.

Criminal responsibility, then, is liability to punishment for crime. Of course, it is for the penal law to determine the elements of such responsibility, in other words, to lay down what classes of persons are to be punished and who are to be exempted from punishment in any given set of circumstances; that is to say criminal responsibility is a *legal* term and nothing else. Mercier says: "The legal sense of the term responsibility is, I suppose, beyond doubt." But inasmuch as criminal responsibility is a legal notion, the term is capable of a legal, and of no other, meaning; at any rate I fail to comprehend how a legal term of art could by any chance have a non-legal signification. Criminal responsibility means liability to punishment, and used in any other sense, the phrase becomes meaningless. Thus plainly stated, the proposition sounds almost like a truism; yet to a disregard of it may be traced much of the confusion and mystification with which the subject is surrounded, nine-tenths of the disputes and controversies between the professions of law and of medicine, and a great waste of temper and printers' ink spent in the production of more or less learned works in which hot battles are fought about an apple of discord grown on the barren tree of a fundamental misunderstanding. From our thesis nakedly advanced and reduced to its simplest dimensions hardly any physician will withhold his assent; but the medical mind and the non-legal mind in general seems to labour under an utter incapacity to grasp it tightly, to follow it into the deductions which must necessarily flow from the principle and to maintain a hold over it when it appears involved in the knot of more complicated problems. Nor is the tendency to swerve from this beacon at the first temptation restricted to English writers on forensic medicine; I have found errors quite as numerous, all emanating from the same source, in foreign medico-legal works. But however much one may

regret that neglect of an almost axiomatic truth should be the cause of so many avoidable fallacies and misunderstandings, too much blame must not therefor be attached to the medical profession. For I shall have occasion to show that even legal authors of the highest repute, here and elsewhere, nay that learned judges have not always succeeded in avoiding this error, and that provisions involving a similar confusion have found their way into several penal codes.

Having thus defined criminal responsibility, let us now consider in detail both what it is and what it is not; by approaching the problem both from its positive and its negative side, we shall better be able to descend from the abstract to the concrete and to lay bare the erroneous conceptions of the term which lie at the root of so many fallacious arguments.

I. Criminal responsibility is a legal, not a metaphysical term. Many attempts have been made to define it psychologically, as if it were an inherent, an innate quality of the human mind. According to Liszt it means the faculty of being determined by motives in the normal way, while Schlager declares it to be "the condition of a person who is capable of choosing between doing and refraining from an act declared by the penal law to be wrong and punishable, and of acting according to such choice." If we closely scrutinise these two definitions, we discover that, according to them, criminal responsibility is much the same thing as freedom of will; in fact, Liszt recommends the substitution of the words of his definition for the latter term in Paragr. 51 of the German code; and Luff tells us that "the majority of writers on forensic medicine agree that the real criterion of responsibility is the freedom of will." But it is Siemerling's definition which gives us the key to the confusion of mind which converted the term into a metaphysical one: "Criminal responsibility (imputability) is the psychological foundation for the effectiveness of the penal laws." The train of thoughts which brought about this deflection of meaning must have been something like the following: Certain abnormal states of mind are declared by the

criminal law to render dispunishable acts otherwise criminal; the law presupposes a certain mental condition, the normal mind, as the foundation of all criminal responsibility; the normal mind is the basis which enables the judge to inflict punishment; the punishable mind is the normal mind; now the investigation of the normal mind is the province of psychology; and by teaching us what is the normal state of mind, it impliedly demonstrates what is abnormal, and therefore dispunishable. Thus psychology enables us to arrive at a solution, from the subjective side, of the problem which the law has placed objectively before the judge. The normal state of mind is the subjective correlative of criminal responsibility, is the state of criminal responsibility itself merely in its subjective aspect. More than one code has, by understanding the term 'criminal responsibility' in a psychological sense, arrived at the strange result of making responsibility its own test or standard; *cp.* Paragr. 39 of the Danish code, Art. 37 subsec. 1 of the Dutch code, and indications of a similar abuse of the term abound in the Swiss Cantonal codes; thus Art. 45 of the code of Grisons commences as follows: "Criminal responsibility is wanting, and the penal laws are not, therefore, applicable" (note the word 'therefore'(!)); thus Art. 34 (4) of the code of Unterwalden, where it is provided that punishment is to be reduced "in proportion to the diminution of responsibility proved to exist," and the draft-code of Neuchâtel boldly speaks of an "intellectual irresponsibility." Now, a very little reflection, I think, ought to suffice to convince us how fallacious must be the reasoning which leads to a psychological or a metaphysical conception of the term 'criminal responsibility.' By asking whether a person is criminally responsible we simply ask whether he is liable to punishment for an act as for a crime; the question is obviously meaningless unless it is asked with reference to some given system of law. To take a very simple example: under the Chinese penal law insanity is no ground of exemption from punishment; in France, on the other hand, insanity without more

excuses; the question whether A., a lunatic, is criminally responsible must be answered in the affirmative if he has committed a crime within the jurisdiction of the Celestial Empire, in the negative if he has committed it on the other side of the English Channel; but his mental state was *ex hypothesi* the same in both cases. Or let our Parliament enact to-morrow that lunacy be no longer recognised as a defence to a criminal charge: B., a hopeless madman, will escape punishment if tried to-day, but he will be held responsible and made to feel the full severity of the law if tried after the new Act has come into operation: yet calling back a lunatic to his senses is one of the few things which Parliament cannot do. That which so varies with time and place and may be changed by a caprice of the sovereign legislature cannot possibly have its foundation in the innate qualities of the human mind. I think I have clearly shown the utter hopelessness of the psychological conception of the problem, and feeling lighter for having thrown overboard the metaphysical ballast, I proceed to state that—

II. Criminal responsibility is a term of positive law, of law as it is, not as it ought to be. Austin never tires to point out how a confusion of these two fundamentally different ideas of law converts argument into unintelligible jargon; and Stephen, when showing that Maudsley has fallen a victim to this error, remarks that it "is the pitfall into which nearly every critic of the law who is not a lawyer is sure to fall." Mercier quotes this passage, and continues: "This pitfall I shall try to avoid, but I do not think its avoidance need compel me to confine myself exclusively to the legal sense of the term responsibility"; and he goes on to say: "The sense which I attach, throughout the following discussion, to the term 'responsible' is 'rightly liable to punishment,' and responsibility becomes the quality of being rightly liable to punishment. . . . By *rightly* liable to punishment, I mean liable to punishment on grounds that appear fair and just to the ordinary man when they are explained to him—grounds that commend themselves as equitable and

right, not to the faddist, the pedant, or enthusiast, but to the common sense of the common man of this time and this country. If I fail to gauge his temperament with accuracy, so much the worse for my argument." Now, an investigation into the question of responsibility, as here defined, is a perfectly legitimate one, and if undertaken by an observer as keen, a thinker as clear, and an author as brilliant as Mercier, could not fail to result in a work both interesting and instructive. But the inquiry which this writer undertook is not a legal one; in fact his explanation of the term 'responsibility' in the sense in which he uses it, is a very good definition of *moral* responsibility; and I grant that he has accurately gauged the temperament of the man in the street and the contemporaneous positive morality of this country in respect of his theme. But has he avoided the pitfall against which he declares himself proof through Stephen's warning? No; long before he forms the good intention which paves the way to damnation for any one, the wisest and ablest not excepted, who embarks on the investigation of a subject of law, on the borderland of law or merely running parallel with law without having mastered Austin's elementary notions, nay, before he has written the preface to his book, he has suffered shipwreck; the title-page bears the inscription '*Criminal* Responsibility,' which is clearly a misnomer. But with all of that Mercier forms the laudable exception in that he gives us fair warning that he uses the term 'responsibility' in a non-legal sense; almost all other non-legal authors employ the term now with its legal meaning, now with some other signification, quite indiscriminately, and they jump from the one to the other without giving the slightest indication of the change. Thus Taylor declares: "The rule of law on this subject is that no man is responsible to the law like a sane person for any act committed by him while in a state of insanity" (vol. i. p. 870). Two pages later we find: "It would thus (*i.e.* from the answers of the judges in MacNaghten's case) appear that the law, in order to render a man responsible for a crime, looks for a consciousness of right and wrong and a

knowledge of the consequences of the act"; and on p. 893: "The true test for irresponsibility in all doubtful cases appears to be, whether the person at the time of the commission of the crime had, or had not, a sufficient power of control to govern his actions." Now, if the term 'responsible' has the same signification in the three passages, the three propositions are clearly inconsistent and contradictory; moreover, if responsible means responsible by the criminal law of England—and the author deals with no other system of law—the first and third statements are obviously false. To get some sense out of his statements, the second sentence must be understood to refer to the English law as it is, the first and third to the law as it ought to be; and even then the first and third propositions cannot be reconciled, unless, indeed, in the third the author means to define the word insanity as it occurs in the first passage—in which case he is further guilty of confounding insanity and irresponsibility. If the reader is confronted with such perplexities in a work which is still considered in this country, rightly or wrongly, as gospel in all matters relating to forensic medicine, I can spare myself the trouble of multiplying examples from the writings of the *dei minorum gentium*. Furthermore, the statement of law as it ought to be has not usually in medical works reference to the standard of fairness of the ordinary man, *i.e.* to the standard of positive morality, but either contains a mere expression of the author's personal opinions or reflects the views afloat in the medical profession. I do not for a minute dispute the right of the physician to publish to the world either his individual views or those held by the members of his profession in general, as to the question of criminal responsibility with reference to the insane. Modern systems of law are not like the law of the Medes and Persians which altereth not; in progressive communities the laws ought to reflect the solid knowledge of the age in which they are made, following slowly but surely in the wake of advancing science. And as a citizen, the physician has not merely the right, he has the duty to make his voice heard when

he finds that the provisions of the law are out of harmony with the established data of his science, and he is entitled to claim that the legislature lend a willing ear to his demands for reform in all matters where his knowledge is the material with which the law has to deal. But here both his right and his duty ends. Having brought home the truth to the powers that be, he must leave it to society to deal with it as it pleases. Moreover, he ought to be careful to claim legislative recognition only for the well-established conclusions of his science. "Unfortunately theory has often outrun, obscured, and discredited knowledge; and it is, therefore, not surprising that the powerful and responsible officials who administer and alter the common law, should refuse to make changes of the reason and necessity of which they have not been convinced." By proclaiming to the world as scientific facts ephemeral hypotheses, however ingenious they may be, he merely brings into discredit the profession to which he belongs; for though the law ought to take notice of all genuine progress in the realm of human knowledge, it cannot follow, nor ought it to follow, all the currents of fashion which, for a time, dominate in the schools. And, finally, I must remind my brethren in the profession of medicine that the witness-box is not the proper platform for the propaganda of reform. The medical witness entirely misconceives his position if he attempts to interfere with the administration of the law which is the judge's function, or if he arrogates to himself the sovereign power of modifying or altering the law. The witness-box is not the proper place even for a mere criticism of the existing law. The function of the expert is to co-operate in the administration of the law as it is by placing before judge and jury facts which he is eminently fitted to observe, to explain the meaning of those facts in the light of his science, to express opinions on matters on which he is alone competent to form any opinion at all, to answer questions in the sense in which they are put to him, and thus "to interpret to the court a language which the court does not understand." By ever remembering these his true functions,

he will secure for himself a fair appreciation of his opinions, instead of calling forth those scathing remarks from the bench which have too often hurt medical sensibility, but which, if rightly understood, were, for the most part, not levelled at medical science, but at attempts to overstep its legitimate province and to usurp functions which it cannot in fairness claim. But whenever and wherever medical men ventilate their views about criminal responsibility, they ought to be consistent and careful—and this brings me back to the point from which I started—to distinguish between law as it is and law as it ought to be.

III. Criminal responsibility is a legal, not a medical, term, and this is so even though the question be asked with reference to the insane. For, to put it plainly, criminal irresponsibility and insanity mean two utterly different things; and as responsibility is a purely legal term, so insanity is a purely medical term. There can be no 'legal madness' or 'insanity in a legal sense' any more than there can be medical irresponsibility or irresponsibility in the medical sense. In fact, as Binsse well puts it, "the distinction between insanity and responsibility marks the boundaries of the separate and distinct provinces of law and medicine. The difference between mental health and disease is, and must remain, a fact of science within the purview of medicine. On the other hand, the determination of the relation of mental disease to guilt, and to the punishment of such guilt, and of the point of separation between the conditions of responsibility and irresponsibility must be the exclusive function of the law." This difference is fully recognised even in those systems of law, like the French, in which insanity *per se* confers immunity from punishment: even here the judge has to decide on the criminal liability of lunatics on his own undivided responsibility; indeed, in the early days of the Code pénal he had to perform the heavy and difficult task unaided by expert evidence, and now it is a well-established principle that the judge is in no way bound by the opinion of experts. It seems very strange that whilst in countries where the provisions

of the penal laws appear to extend a standing invitation to those engaged in their administration to fall victims to the error of identifying insanity and irresponsibility, the true nature of things is, at any rate in theory, well understood, a confusion of these fundamentally different notions should form the rule rather than the exception with authors belonging to such states as have taken good care to lay it down as a principle of penal law that insanity in itself and without more does not confer irresponsibility. The identification of the two conceptions is so widespread a fallacy as to become monotonous in spite of the protean forms under which it disguises itself. Whilst a great many penal codes have adopted the French plan, other systems of law have preferred to define the conditions under which alone insanity excuses a breach. I am not here concerned with a comparative appreciation of the two methods of dealing with the question: this problem will form the subject of a later chapter. What I am here engaged in, is the task of making it quite clear what the law means when it provides that no one is to be acquitted on the ground of insanity unless he was, at the time of doing the act, deprived by mental disease of the power of distinguishing between right and wrong, of determining his will, of controlling his actions, etc. What the law says is in substance this: to establish the irresponsibility of the actor, two things have to be proved—

(1) That he was insane at the time of the act—and this is a purely medical question.

(2) That, by reason of mental disease, he was unable to distinguish between right and wrong, to determine his will, to control his actions.

Now, condition (2) is constantly miscalled the legal test or legal definition of insanity, as if it were the criterion by which the law wishes to determine whether the accused was deprived of his senses or not: whereas in truth and in fact question (2) can never arise before question (1) is answered in the affirmative. It might be conclusively shown that the prisoner was for some reason or other, *e.g.* drunkenness, deprived of the faculty of

knowing right from wrong, no court would think of drawing therefrom the conclusion that he was a lunatic: on the contrary, the judge would rightly exclude such evidence as irrelevant, unless by some proof of insanity a foundation was first laid for its admission. It is only after evidence has been given sufficient to establish a *primâ facie* case of insanity that the second condition of irresponsibility can be inquired into at all. Knowledge of right and wrong, freedom of will, power of self-control are in various systems of law the tests of responsibility applicable to those who are proved to be insane, and it is a thousand pities that the shorter but most inaccurate expression 'legal test of insanity' should ever have been used; confusion of language must of necessity be both the outcome and the cause of confusion of thought. So we cannot wonder that the term has been almost universally understood to mean a pathognomonic sign of insanity laid down by the law. The law would be an ass indeed if it had attempted a legal definition of a purely medical term; but it has never tried to do anything of the kind; it willingly renders unto the physician the things which are the physician's, and does not care in what manner or by what means his science enables him to arrive at a diagnosis; nor does it inquire what is the medical test of insanity, or whether such a test does or can exist at all. I now proceed to give some extracts involving this confusion of thought both from legal and medical literature. "There cannot be two criteria of insanity, a legal and a medical, the one contradictory of the other and both be correct. That which is false in science cannot be true in law; and that cannot be health in law which is disease in fact. When the law says that for an insane act the perpetrator is irresponsible, and the court announces to the jury as the true test of insanity of the individual a test or criterion which the expert on oath testifies is not a true test or criterion —a test which is scientifically false—and offers another test or criterion which the court directs the jury to ignore, obviously either the court or the expert is in error; for both cannot be right." (Buckham.) "In a legal inquiry the end to be attained

by the lawyer is identical with that which the physician sets before himself, viz. the diagnosis, discrimination, or distinction in a particular case of insanity from sanity and from feigned disease. The object of the two professions, when they thus come into contact, is the same; it is not, then, to determine what insanity is nor what are the signs of its presence, but whether the signs, criteria, or tests of its existence applied to the case in question will place the individual into the category of the sane or insane. Each profession has arrived at an understanding among its own members as to what insanity is, and what are the signs of its presence; but, unfortunately, the two do not agree upon either point." (Russell Reynolds.) And again, the same author says: "With regard to this test (viz. capacity of distinguishing between right and wrong), I may say, and most emphatically, that it is utterly untrustworthy, because untrue to the obvious facts of nature. There are thousands of undoubted lunatics in our asylums and elsewhere who know the difference between right and wrong as well as we do; who know the consequences of their actions as well as we do; and there are among these a large number whose pain and torment —whose actual disease, indeed—exists in a morbid exaggeration of the sense of right and wrong as applied to themselves and to their conduct in the present and past." A similar opinion is expressed by Sachs: "The right or wrong test has been the stumbling-block in the advance of legal psychiatry, and, as a matter of fact, if the test here mentioned were to be applied to the insane, nine out of ten lunatics would have to be declared sane; for most of them are perfectly aware of the nature of the acts they commit." If the author had said 'nine out of ten lunatics would have to be declared *responsible*,' his words would have some sense; as they stand, they are meaningless. The same identification of insanity and irresponsibility is found in the summing-up of Justice Doe in *The State* v. *Pike* (49 N. H. 399): "The testimony of the experts negatives the idea that knowledge of right and wrong is the test. And the admission of this evidence, coupled with the rule given by the court to the jury

that knowledge is the test, brought the law into conflict with itself. Either experts testified a question of law, or the court testified on a question of fact. . . . It is the common practice of experts, under oath of a witness, to inform the jury, in substance, that knowledge is not the test, and for the judge, not under the oath of a witness, to inform the jury that knowledge is the test. . . . If the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself qualified to testify as an expert. To say that the expert testifies to the test of mental disease as a fact and the judge declares the test of criminal responsibility as a rule of law, is only to state the dilemma in another form." The way to escape from the dilemma is a simple one; if we clearly understand and clearly state that the function of the expert is to testify to the fact of insanity, not to testify to the test of mental disease as a fact, all difficulty and doubt vanishes. "There is no such thing as 'legal madness' any more than there is 'legal small-pox' or 'legal earache.' It is a disease, and the law knows nothing about its symptoms or its cure; the condition of the mind is to be ascertained, not by legal subtleties and wordy definitions, but from facts and the knowledge of scientific men." Quite so; but, unfortunately for Mr. R. Harris, the condition of the mind is not the same thing as criminal responsibility. Under a similar misapprehension labour those who believe that by the so-called tests of insanity the law means to determine, if not the presence or absence of mental disease, at any rate that degree of insanity which relieves from criminal responsibility. "Many attempts have been made," says Bishop, "to discover what has been assumed to exist, a form of words termed the test of insanity, which, put into the hands of jurors, can be used by them as a sort of legal yard-stick, to measure the evidence and to determine whether or not the prisoner had a sufficient length of mental alienation to escape responsibility for his act. But the test has never been found, not because those who have searched for it have not been

able and diligent, but because it does not exist." And with all due respect I submit that even learned judges have fallen victims to this error. Thus in the trial of Daniel E. Sickles (U.S. Court for the District of Columbia, 1859), Crawford, J., said: "Whether a man is insane or not is a matter of fact; what degree of insanity will relieve him from responsibility is a matter of law the jury finding the fact of the degree too." And in *R.* v. *Blampied* (Maidstone Assizes, July, 1875), Mr. Justice Brett is guilty of the same laxity of language and of thought if he says in his charge to the jury: "This man may be mad. I assume that he is so in the medical sense of the term, but the question here is, whether he is *so bad* as to be absolved from the consequences of what he has done. He is not so absolved though he is mad, if he was not *so mad* as not to know what he was doing or not to know that he was doing wrong." Here, then, criminal irresponsibility on the ground of insanity first becomes legal madness, and then legal madness is made to appear as a species of a high order of the genus medical madness. The wording of several of our colonial codes lend colour to such misconception. Thus both Sec. 11 of the Code of Canada and Sec. 23 (2) of the Code of New Zealand contain the words, 'to such an extent.' In reality, the law does not undertake to define the degrees of insanity any more than its nature or kinds. Medical men are quite right, if they assert that knowledge of right and wrong and similar criteria are not reliable measures of the degrees of insanity and absolutely useless as indices to the seriousness or gravity of any case; but these criteria were never meant by the law to serve any such purpose, and, to put it quite bluntly, the problems which they involve are not medical questions at all, but purely psychological ones; the medical question must be practically disposed of before these tests can be applied. In Germany, where freedom of will is the test by which the criminal responsibility or irresponsibility of the insane is gauged, two at least of the greatest alienists, Griesinger and Mendel, have betrayed a deep insight into the true character of

the problems involved, the former during the later years of his life, the latter throughout his brilliant professional career persistently refusing to express any opinion as to the prisoner's capacity of freely determining his will, on the ground that this was not a question within the purview of medical science, and that, therefore, the physician was not, in his capacity as an expert, in a position to give an answer. So in this country both Dr. Haslam and the late Dr. Forbes Winslow agree that "it is not the province of the medical witness to pronounce an opinion as to the prisoner's capacity of distinguishing right from wrong." In countries where insanity is not in itself a defence, the superadded second criterion is almost everywhere a psychological one. I do not say that it is so in the necessary order of things; a capricious legislature might exempt from punishment only those lunatics who have blue eyes or whose height is above six feet, and in either of these cases the second criterion would be an anthropological one. But, in practice, the second criterion is generally of a psychological character: in these countries, then, the criminal responsibility of lunatics involves two elements, one medical, one psychological, and the fact that questions aiming at the solution of the latter problem are, almost as a matter of course, submitted to the medical witness along with such as tend to establish the prisoner's insanity, which latter alone are within his legitimate province, has obscured the twofold aspect of the problem, and has been one of the causes which led to the erroneous identification of insanity and non-imputability. The identity of these two conceptions is, indeed, boldly advanced as a legal principle by the author of the Swiss Penal Code Bill, who opines that "the question of responsibility is in substance a medical one, which has to be decided by medical men even there where the legislature has laid down, as a criterion of non-imputability, the absence of the power of discrimination or of the power of disposition"; and he is supported in his error by Professor Zürcher, who recommends the system of the Swiss Bill just because it leaves the decision entirely in the hands of the medical

profession. "A medical conception of the term responsibility," pointedly remarks the learned critic of the Bill (Gretener), "can have its appropriate counterpart only in a medical definition of the word crime." "To identify the notions non-imputability and mental derangement is to commit an error unpardonable either in the criminologist or in the forensic expert." Yet it is in the Penal Code of the State of New York, and in the General Statutes of Minnesota which copy its provisions, that this very error has actually received a legislative sanction. Obviously and avowedly, Arts. 20, 21, 23 of the New York Code of 1881 (*vide postea*) are meant to be a statutory re-enactment of the English common law. Art. 20 runs: "An act done by a person who is an idiot, imbecile, lunatic, or insane is not a crime," thus supporting the contentions of the advocates of the French system who claim the state of New York as a convert to the doctrine of the Code pénal. The following article, however, is but a literal reproduction of the rule in MacNaghten's case, and it is clear that the two provisions are utterly inconsistent and irreconcilable unless we assume that Art. 21 gives a legal definition or a legal test of the purely medical conceptions idiocy, imbecility, lunacy, and insanity; in short, of states of mental disease which, under Art. 20, are declared in themselves to negative crime.

Having followed the error underlying many misconceptions of the law into some of its ramifications, and having indicated two of its minor sources, viz. the ambiguity of the term 'legal test of insanity' and the practice of submitting to the expert questions that involve matters foreign to his science, it now remains to trace it to its main source. In my opinion, this may be discovered in some reasoning such as the following: Insanity in itself and without more ought to excuse;—a proposition to which, at any rate, the majority of the members of the medical profession adhere;—failure to distinguish between what ought to be law and what is law, assisted no doubt by some metaphysical conception of the term responsibility, at once converts a medical postulate into the following argument: the

prisoner is insane; ergo he is irresponsible. Finding that, in spite of the clearest and most convincing proof of mental disease, the judge instructs the jury that this is in itself not enough to justify a verdict of not guilty, but that an additional something must be proved before they can declare the prisoner irresponsible, finding, moreover, that juries sometimes obey the judge's directions and convict a prisoner who is clearly mad, they at once jump to the conclusion that judge and jury apply a test of insanity different to their own, and that the man is legally sane whilst medically insane. The "demens judicio vulgi, sanus fortasse tuo" of old Horace is felt by them to describe with appropriate sarcasm the situation created; medical men then begin to rave about judicial folly, and about the incapacity of the popular tribunal to decide the question, sane or insane? and to raise bitter complaints about the scant respect with which the data of their science are received in courts of law; they never tire to expostulate with Maudsley "that it can hardly be right to reject the testimony of a skilled observer with regard to an accused person's mental state, and then, by hanging him before the progress of his disease can justify the skilled testimony, to cut off the opportunity of rectifying the mistake." They forget all the time that it is not because judge and jury disbelieve in the presence of mental disease where it is discoverable only to the medical eye, though established by all the paraphernalia of psychological medicine, and that the same result might follow in the case of one whose insanity must be obvious at first sight to the first comer; they overlook that, by an affirmative answer to the question of lunacy, that of imputability is not settled, simply because the law refuses to go with them the whole length of the argument: 'insane, ergo irresponsible'; they are not aware that the law requires a satisfactory answer to a second question, and that not a medical one, before it consents to exempt the lunatic from punishment; they do not appreciate that, as long as the law remains as it is, the judge does merely his duty in placing before the jury legal propositions which the jurors could not

possibly divine without direction from the bench, and the jurymen theirs if they do not attempt to override the law, but, taking the law as it stands, bring in a verdict in conformity with the judge's summing-up. Whether the law requires amending is a radically different question; but even if it does, the judge's function is to administer, not to reform it, and much less has a jury the right to disregard its existing provisions. "Judex damnatur ubi nocens absolvitur" (Publilius Syrus).

CHAPTER II.

THE ENGLISH LAW.

Αἰαῖ, τόδ' ἤδη θεῖον ἀνθρώποις κακὸν
ὅταν τις εἰδῇ τἀγαθὸν, χρῆθαι δὲ μή.
Eurypides, Chrysippus Fragm. II.

THE following, I think, is a correct statement of the English law on the subject:—

To establish a defence on the ground of insanity, it must be proved that, at the time of committing the act, the accused was prevented, by disease affecting his mind, from knowing the nature and quality of his act or from knowing that the act was wrong.

A person labouring under specific delusions, but in other respects sane, shall not be allowed to benefit by the plea of insanity, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act.

Since the Trial of Lunatics Act (46 & 47 Vict. c. 38) substituted a verdict of 'guilty, but insane' for the former verdict of 'not guilty on the ground of insanity,' we cannot in strictness say that lunatics are ever irresponsible under English law. For if we define criminal responsibility as liability to be convicted of crime, lunatics are made responsible by the very terms of that statute; and even if we agree with Stephen and understand it to mean liability to be punished for crime, it may still be argued that the statutory sentence which the judge is bound to pass, viz. that the accused be kept in custody as a criminal lunatic till the King's pleasure be known, inflicts a punishment upon the lunatic—a modified punishment it is true, but a punishment nevertheless. The case is different in those

countries where the prisoner, if found insane, is handed over to administrative bodies to be dealt with in such a way as public safety demands, or even under those systems of law which invest the judge himself with a discretion by virtue of which he may order the detention of a lunatic whom he thinks dangerous; in this case, the judge's discretion is not, however, a judicial one; he acts *pro tanto* as an administrator, guided by considerations of the welfare of the public. Not so in England, where the judge *virtute officii* passes the sentence which he is directed by Act of Parliament to pass, much in the same way as he pronounces sentence of death when a verdict of guilty is brought in on a capital charge. It may be objected that the committal of a lunatic to Broadmoor cannot be looked upon as punishment, since such measure is taken not out of revenge, but for the prevention of further crimes by a lunatic who has proved dangerous. Against this it might be urged that though, in practice, the plea of insanity is only set up in the case of heinous crimes, yet the result would be the same if the defence were raised on a charge which is criminal merely in a technical sense and which might not even raise a presumption that the public would run any risk if the lunatic were allowed to be at large. But not to insist upon a point of merely speculative interest, I think the answer fatal to the objection is that the law, even in punishing a sane offender, does not act out of vindictiveness and spite, but to a large extent for prevention. However this may be, it is certainly a contradiction in our system of procedure, a contradiction which, strangely enough, seems so far to have failed to attract attention, that even after 46 & 47 Vict. c. 38 has clearly enacted that a prisoner who successfully sets up the plea of insanity must be declared guilty, the accused should still be able to urge the defence of insanity upon the general issue, *i.e.* on the plea of not guilty.

Let us now compare the above statement of the law of insanity which follows closely the terms of the answers of the judges in MacNaghten's case, with that given by Sir James

Stephen in Art. 28 of his "Digest of the Criminal Law." The article runs thus:—

"No act is a crime if the person who does it is at the time when it is done prevented (either by defective mental power or) by any disease affecting his mind—

"(*a*) From knowing the nature and quality of his act; or

"(*b*) From knowing that the act is wrong; (or

"(*c*) From controlling his own conduct, unless the absence of the power of control has been produced by his own default)."

The parts of the article bracketed the learned author considers as doubtful, and he also states that the word 'wrong' in (*b*) is variously interpreted as meaning (1) Morally wrong, (2) Illegal.

I may say at once that this article, together with the chapter on insanity in Stephen's History, has done more to cast doubts upon the rules of insanity, as laid down in the judges' answers, than the few decisions deviating therefrom which may be found in the reports. In both the learned judge is actuated by one desire, that of conciliating the medical profession, and to make the law conform to the postulates of medical authority, as embodied in the writings of Dr. Maudsley, he is willing to sacrifice either the authority of MacNaghten's case or the clear and obvious meaning of the answers of the judges. How much with him the wish was father to the thought, is shown by a significant passage in his History where he says: "The proposition which I have to maintain and explain, is that, if it is not, it ought to be the law of England that no act is a crime if the person who does it is, at the time when it is done, prevented either by defective mental power or by any disease affecting his mind from controlling his own conduct, unless the absence of the power of control has been produced by his own default." Since I do not believe it opportune to follow the learned judge's example and to dispose in one breath of what is law and what ought to be law, I reserve the investigation into the intrinsic value of the English test from a medico-legal standpoint for

later chapters of my book, and here restrict myself to the inquiry what that test is and to the consideration of those criticisms to which the answers of the judges in MacNaghten's case wherein it is laid down, have been subjected.

The doubts cast upon them may be summarised as doubts—

(1) As to the authority of the answers,

(2) As to their scope,

(3) As to their interpretation.

The authority of the answers is disputed on the ground that MacNaghten's came before the House of Lords not in its judicial capacity, but in debate. Since MacNaghten had been acquitted, it could not, indeed, be brought to the notice of that house in any other way. If, however, it is said that, therefore, the rules laid down in that case have no higher authority in law than "the academic speculations of a mere debating society," it is overlooked that it is not for the discussions which took place in the house, but for the answers given by the judges that authority is claimed. Again, the mode by which the opinions of the judges were elicited is described as anomalous, as no judicial proceeding was pending in reference to the questions asked. The reply to this is that the questions were propounded under a well-established power of the House of Lords to require the opinion of the judges upon abstract propositions of law, a power but rarely asserted, but for the exercise of which at least two precedents can be cited, one occasion being the passing of Fox's Libel Act, the other a difficulty which had arisen in connection with the Canada Reserves. As further arguments against the authority of the answers are advanced the ground on which Maule, J., refused to give a definite reply, viz. that no specific state of facts was presented for consideration by the questions submitted to the judges—and the fact that the points dealt with were not formally argued. "The answers in what was *not* MacNaghten's case," sarcastically remarks Mr. R. Harris, "were no more judicial than when His Majesty's judges gratify the world with their speeches at a Guildhall banquet." The critics who give

utterance to such views forget that the judges were not asked to make law to govern a state of fact which had never before arisen, but were required to declare, and, at any rate avowedly, did nothing but declare, the existing law on the subject. "What *is* the law?" begins question I. It cannot be denied that, under the guise of merely enunciating the established rules of the common law, the answers introduced at least two novelties: firstly, the doctrine of partial insanity which had just wormed its way into our law on the trial of MacNaghten, and which the judges were anxious to impress with the seal of authority; for this purpose they dragged into their answers the unfortunate term "partial delusions" of which no trace can be discovered in the questions submitted to them. I shall deal with the subject of partial insanity in a later chapter, but here I may be permitted at once to remark that the proposition embodying it is, in my view, the weakest part of the English law. Secondly, the law propounded by the judges modified the knowledge test in so far as the question of capacity to distinguish between right and wrong was no longer to be put generally and *in abstracto*, but with reference to the particular act at the particular time of the commission of the crime. But in embodying in their answer the knowledge test itself, which certainly forms the pivot on which the whole theory of the English law of insanity turns, they merely adopted the view which runs through the whole series of decisions since Hadfield's trial in 1800 that the responsibility or irresponsibility of a prisoner alleged to be of unsound mind depends upon the presence or absence of the faculty of distinguishing right from wrong. That the opinions given by fourteen of the most experienced judges must carry the greatest possible weight, cannot well be disputed; and that they must possess an intrinsic value far superior to the decision of an ordinary case given in the hurry of judicial business, must be apparent if we remember that the judges took over three months to consider the questions before delivering their answers, and finally delivered them "after anxious deliberation

and, no doubt, after the fullest consideration of everything that had been written or decided upon the point in England." But even granting that the authority of these answers was originally somewhat doubtful, surely any such defect must be cured by now, since in every subsequent case the opinions there expressed have been followed, as the most authoritative expression of the law upon the subject. By being made the *ratio decidendi* of every judgment delivered since the year 1843, the principles enunciated in MacNaghten's case could not have failed to gain a firm footing in our criminal law, and all objections as to their authority must completely vanish if we use the expression "the answers given by the judges in MacNaghten's case" merely as a convenient and comprehensive formula to indicate those maxims of the law of insanity laid down in a long and practically uninterrupted string of cases during more than sixty years.

Even assuming that the answers were once a true statement of the law—opine hostile critics of their authority—they have long since ceased to be so; for they were condemned by judges of the greatest ability, ignored by some judges when they have thought right so to do, and are constantly disregarded by juries, who determine the plea of insanity not according to the law laid down by the bench, where the judge in his summing-up directs them to base their verdict on the principles laid down in MacNaghten's case, but are guided by 'the higher dictates of humanity.' It must be conceded that more than one judge has expressed his dissatisfaction with the answers; but the very opinion that they ought no longer to be law, contains an implied assertion that they are still law. Thus Lord Coleridge, who is often quoted as one of the judges who reject their authority, necessarily confirms it if he says "that he considered that judicial decisions on questions of insanity were bound by an old authority which by the light of modern science was altogether unsound and wrong. The law of England on the subject was contradicted by modern science" (*R.* v. *Pearsall*, *Worcester Journal*, February 18, 1888). It is also true that in

a very few cases which they looked upon as exceptional, judges felt at liberty, in directing juries, to deviate from the answers; but it is certainly an exaggeration and very far off the mark if Dr. F. J. Smith believes "that every judge acts according to his own opinions and not according to any strict definition, though his opinions are largely influenced by that of the medical expert." In an overwhelming majority of cases the law is certainly laid down in strict accordance with the answers in MacNaghten's case; and in the isolated instances where the summing-up does not follow the terms thereof, the judge seems to have looked upon them as being an incomplete rather than an unauthoritative statement of the law. Assuming that juries do not, on the question of insanity, take the law from the bench, but give their verdict according to their opinion upon a much wider question, namely, whether, under all the circumstances, the prisoner ought to be punished—and whether they do so, as Markby thinks, because they feel wholly incompetent with nicety to solve the very peculiar and difficult question which the law requires to be placed before them, or without any such diffidence in their own powers, simply because they care very little for generalities, as Stephen informs us—the legal reader need not be reminded that the verdicts of a thousand juries cannot make, alter, or undo a legal rule; but it is necessary to impress this fact upon medical writers, many of whom do not seem to be aware of it.

The next question is whether the rules laid down in MacNaghten's case contain the whole of the law on the subject-matter, and whether no accused person can successfully set up the plea of insanity unless he can show that his case is covered by the answers of the judges. Lord Wensleydale, who, as Mr. Baron Parke, had taken part in formulating them, in his reply to Mr. Waddington's question before the Royal Commission on Capital Punishment, 1875, clearly stated that the answers were meant to be a full exposition of the law. But even without such authoritative testimony, it is obvious that they could not well be meant to be anything less; the

answers have considerably extended the scope of the plea of insanity, but there is certainly not a single previous case on record in which a prisoner was acquitted on that ground who would not satisfy the test laid down in the MacNaghten rules. The view of Lord Chief Justice Cockburn, expressed in a letter on the Criminal Code Bill, that the answers embodied only so much of the law as sufficed to answer the specific questions that had been submitted to the judges by the House of Lords, cannot for a minute be maintained. Though the answers in MacNaghten's case must, therefore, be taken to be a complete declaration of the whole law in 1843, it does not necessarily follow that they enunciate all the rules on insanity by which the courts are now guided. For the terms of these answers contain nothing that would have rendered it impossible for our judges to establish additional tests, and we must, therefore, inquire whether any supplementary principles have been evolved by subsequent decisions. We have already mentioned that in a very few cases which they thought exceptional, judges have left to juries a free hand to go beyond the scope of the answers in MacNaghten's case; but by looking upon them as exceptional, these judges have undoubtedly repudiated all intention of thereby establishing precedents, and manifested their conviction that those isolated instances are not, cannot, and should not be governed by any rules whatsoever. Let us now see in what direction the judiciary law made since 1843, if any, must be looked for. Mr. Justice Stephen tells us in his History that if the answers are regarded as exhaustive, it would follow "that the effect of insanity upon the emotions and the will is not to be taken into account in deciding whether an act done by an insane man did or did not amount to an offence," and the proposition that the effect of disease upon the emotions and the will can never, under any circumstances, affect the criminality of the acts of persons so afflicted, appears to him so surprising and likely, if strictly enforced, to have such monstrous consequences, that something more than an implied assertion of it seems to him necessary before it is admitted

to be part of the law of England. And in his "General View of the Criminal Law," the same learned writer expresses himself even more explicitly: "It has been thought that the law of England is that the fact that a man is disabled from controlling his conduct by madness is not, if proved, a good defence to a charge of crime in respect of an act so done. This appears to me to be a mistake traceable in part to a misunderstanding of the meaning and in part to an exaggeration of the authority of the answers of the judges in MacNaghten's case." The point, then, about which the answers are silent, but which is now claimed to be part of the law of the land is the recognition of the loss of the power of self-control as excusing crime in the case of a lunatic. Apart from some *obiter dicta* of different judges that an insane impulse *should be* admitted as a defence if proved to be really irresistible, I am acquainted with but two cases in which such a defence *has been* admitted in England. The one is *R.* v. *Jordan* (1872), where Martin, B., said, "Under such circumstances it was for the jury to consider whether it was safe to convict the prisoner of murder. When such impulses came upon men, according to the medical evidence they were unable to resist them. It would be safe in such a case to acquit the accused on the ground of insanity." The other is *R.* v. *Gill* (1883), where Mr. Justice Kay appears to have taken a similar view. In charging the jury, he is reported to have told them that "if a man's mind was in such a diseased condition that he was subject to uncontrollable impulse, they would be justified in finding him irresponsible for his actions; that what the jury had to ask themselves was, Was the prisoner's mind subject to an uncontrollable impulse over which his will had no power? If so, they must acquit him on the ground of insanity." But, on the whole, this view of the law taken by Baron Martin and Justice Kay is shared by very few other judges. On the other hand, there is a long series of cases, from 1848 down to a recent date, in which it is clearly laid down that the English law knows no such defence. The most important decisions by which the plea of

an irresistible impulse was rejected are *R.* v. *Stokes* (Rolfe, B., 3 C. & K. 185 (1848)), *R.* v. *Barton* (3 Cox C. C. 275 (1848)), where Baron Parke remarked that "the excuse of an irresistible impulse co-existing with the full possession of the reasoning powers can find no countenance in the law of England"; *R.* v. *Pate* (1850), in which Baron Alderson said, "The law does not acknowledge the doctrine of an uncontrollable impulse, if the person was aware that it was a wrong act he was about to commit"; *R.* v. *Haynes* (Bramwell, B., 1 F. & F. 666 (1859)); *R.* v. *Burton* (3 F. & F. 772 (1863)), in which Wightman, J., again laid down that "a state of mind in which a man, perfectly aware that it was wrong to do so, kills another under an uncontrollable impulse is no defence for a crime"; *R.* v. *Leigh* (Erle, C.J., 4 F. & F. 915). It must also be remembered that when in 1878 an attempt was made to codify the criminal law of England, and Sir James Stephen drafted a code in which he introduced the ground of exemption for which he contended, the commissioners erased from sec. 22 the provision by which an irresistible impulse was made to confer immunity, and the ground upon which they rejected this defence clearly shows that they considered it as an innovation, and as an undesirable innovation into the bargain (see their Report).

Having come to the conclusion that the answers of the judges in MacNaghten's contain an exposition of the law relating to the criminal responsibility of lunatics that must be considered as both authoritative and exhaustive, it still remains to ascertain their exact meaning and to dispose of those difficulties which are said to arise in their interpretation. The first doubt in Sir James Stephen's mind is whether want of knowledge, to excuse crime, must be the product of 'disease affecting the mind,' or whether it affords a like protection if resulting from 'defective mental power.' To the medical mind the learned judge appears here to have made a distinction without a difference. Defective mental power, merely synonymous with intellectual gifts of a low order, is certainly not a defence; if the outcome of insanity, defective mental power is the effect

of, and cannot therefore be opposed to, disease affecting the mind. What Stephen probably intended to contrast, is idiocy and imbecility on the one hand, with insanity breaking out in later life on the other. But inasmuch as the former two terms signify nothing else than two different degrees of mental disease, either congenital or acquired in earliest infancy, it seems unnecessary specially to provide for these two states, and distinctly unreasonable to put on the expression 'disease affecting the mind' a construction so narrow and artificial as to hold that the two conditions named are not comprised in it. It is not, however, certain whether this is the distinction which Stephen meant to draw; for the term 'power,' when used by the learned author in connection with the subject of insanity, must always arouse suspicion; and the example which he gives as an illustration (*vide* Stephen's Digest of the Criminal Law, Art. 28, example 2) is not free from ambiguity, since it involves the uncertainty in which, according to him, the word 'know' in the answers in MacNaghten's case is clouded. Possibly he wanted to signify by 'disease affecting the mind' and 'defective mental power' insanity with and without delusions respectively, and thus to refer to the controversy whether delusions are or are not necessary, in the theory of the English law, to establish the plea of insanity. Now to the alienist delusion is the pathognomonic sign of insanity; but no physician would think of denying that insanity may exist without delusions, or hesitate to diagnose it from other signs, in the absence of a single delusion. In criminal trials delusion had never been heard of until Erskine brought it to the notice of the court in his defence of Hadfield. "Delusion," said the distinguished counsel, "where there is no frenzy or raving madness, is the true characteristic of insanity," and again: "When a man is labouring under a delusion, if you are satisfied that the delusion existed at the time of the committal of the offence, and that the act was done under its influence, then he cannot be considered as guilty of crime." This passage was quoted with approval by Lord Kenyon in the House of Lords

in 1843 (*vide* Hansard, vol. 67, p. 719). The opinion is often expressed that in Hadfield's case delusion was established as the legal test of insanity; this is incorrect, for, as Dr. Maudsley rightly remarks, "the acquittal did not take place in consequence of a judicial adoption of delusion in place of the old criterion of responsibility, but was rather a triumph of Erskine's eloquence and of common sense over legal dogma." Indeed, twelve years later, Sir James Mansfield refused to admit the excuse of delusion in the case of Bellingham. It is nevertheless true that the doctrine of Erskine has largely percolated through the legal profession, and a good many lawyers still believe it to be "a rigid rule of law that no insanity will excuse the commission of a crime unless such insanity be accompanied by delusion," and unless the act charged as criminal arose out of that delusion. The answers in MacNaghten's case do not lend colour to such a view; they rather seem to support a contrary opinion; for whilst in replying to questions I. and IV., which deal with partial insanity, the judges expressly restrict what they considered to be the influence of delusions upon responsibility to those 'not in other respects insane,' neither this qualifying clause nor the word delusion occurs in their statement of law which was to govern cases of general insanity, with which subject they deal in answers II. and III. Now if the judges had thought that nothing but delusion would excuse, or that general insanity differed from partial insanity merely by the greater number of delusions, surely they would have found it quite unnecessary to lay down a special test applicable to general insanity. The rule laid down in answers I. and IV. would have amply sufficed: it would only have been necessary to apply it as many times as there were different delusions. But they studiously avoid the use of the term 'delusion' when treating of general insanity, though it occurs in question II., and make irresponsibility depend "upon such a defect of reason, from disease of the mind, etc." Let us illustrate the subject of controversy by an example. Let us take the case of a patient affected with general paralysis of the

insane, commonly called softening of the brain, or with senile dementia, vulgarly known as second childhood, and let us assume that such mental disease has not produced a single delusion, but has destroyed memory to a very considerable extent. Every alienist will remember cases where lunatics have completely forgotten that they are married. Let such a one go through a form of marriage with a woman whilst his first wife is alive. He is charged with bigamy; the defence of insanity is set up on his behalf. Will any lawyer seriously maintain that the prisoner is not protected by answers II. and III., let their terms be construed in as narrow a sense as you like? Lord Denman, indeed, instructed a jury that to say a man was irresponsible without positive proof of any act to show that he was labouring under some delusion seemed to him to be a presumption of knowledge which none but the great Creator could possess (*R.* v. *Smith*); and in *R.* v. *Townley* (3 F. & F. 839), Martin, B., told the jury that what the law meant by an insane man, was a man who acted under delusions and supposed a state of things to exist which did not exist, and acted thereupon; a man who did so was under a delusion, and a person so labouring was insane. The example of the forgetful bigamist which I have just given clearly shows that a man need not necessarily have delusions in order to suppose a state of things to exist which does not exist; loss of memory will serve the purpose quite as well. I think it can fairly be claimed that Lord Denman did not mean to assert that insanity cannot excuse unless there be delusions; he simply pointed out the extreme and sometimes unsurmountable difficulty of establishing the existence of insanity in the absence of delusion. A much more acceptable statement of the law is that of Byles, J., in *R.* v. *Burton* (Maidstone Lent Assizes, 1862): "Even morbid delusions cannot always be allowed to screen a criminal from the consequences of his own acts, while there are instances in which a plea of insanity may properly be allowed, although no such delusion can be proved." It must not be forgotten that the whole history of our law as to the

criminal responsibility of lunatics shows how with advancing medical knowledge, and with the pervasion of more humane notions upon the subject of insanity, a larger and larger number of madmen were allowed to escape under the expanding plea of insanity who could not, at an earlier period, have benefited by it; and it cannot, therefore, be well maintained that a symptom should now be necessary to establish that defence which was not even an indispensable part of the mental outfit of Justice Tracey's wild-beast-lunatic.

"I am of opinion that, even if the answers given by the judges in MacNaghten's case are regarded as a binding declaration of the law of England, that law, as it stands, is, that a man who by reason of mental disease is prevented from controlling his own conduct is not responsible for what he does." Thus writes Sir James Stephen. We have already noticed that the learned author, in order to maintain his favourite contention, doubts the authority of the answers, and claims that, in the best of cases, they are an incomplete statement of the law. To save his child of sorrow, he does not even stop here; but, failing all other means, he attempts to insinuate uncontrollable impulse into our law by a strained and unnatural construction of the word 'know' in the rules laid down by the judges. It is quite true that this term is capable of being understood both in a very narrow and in a very wide sense. But I think the limits of legitimate interpretation are already overstepped by the learned judge in *R.* v. *Davis* (14 Cox C. C. 563), where he said: "As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action—any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason—may be fairly said to prevent a man from knowing what he did was wrong." Whilst Sir James Stephen is prepared to go to that length in his judicial capacity, nothing will arrest the flight of his imagination where he appears without his robe of office, in the character of a legal writer, or

rather in that of an advocate resolved, at all costs, to shape the law in the mould fashioned by the medical faculty. "It appears to me," he says, "that, when carefully considered, they (*i.e.* the answers of the judges) leave untouched the most difficult questions connected with the subject, and lay down propositions liable to be misunderstood, though they might, and I think ought, to be construed in a way which would dispose satisfactorily of all cases whatsoever." Everest's criticism of this passage is very much in point; he remarks that it is difficult to understand how answers which leave untouched the most difficult questions connected with the subject can be construed in a way which would dispose satisfactorily of all cases whatsoever. I should say that the only way to escape from this difficulty is to read into the terms of the answers a meaning which they were not meant to convey and which they cannot fairly be said to convey to the mind of the ordinary mortal. And that is what Stephen has done when he advanced the proposition that a lunatic who acts under an irresistible impulse does not know that his act is wrong, because he is unable to refer to distant motives and general principles of conduct and to direct his conduct accordingly. It is quite correct that "knowledge and power are the constituent elements of all voluntary action"; but if he goes on to state that "it is as true that a man who cannot control himself does not know the nature of his acts as that a man who does not know the nature of his acts is incapable of self-control," the second half of the dictum is certainly true if it is intended to express the obvious fact that a man who does not know what he is doing cannot help doing wrong. But the first part must be based on a system of psychology the teachings of which, I confess, I can neither understand nor adopt. Since capacity to control conduct has been proposed as an additional test to meet those cases in which a lunatic yields to an ungovernable impulse, whilst all the time knowing both what he is doing and that that which he is doing is wrong, it requires a superhuman effort of the mind to appreciate how a man who well knows what he is doing must be held not to

know it because he could not control himself. It seems incomprehensible that the inconsistency and manifest absurdity of such a view of the law should have escaped a mind as lucid and as penetrating as that of Mr. Justice Stephen.

Whilst hitherto we had to deal with criticisms that seem to seek difficulties where in truth there are none, a *bonâ fide* doubt arises when we come to the interpretation of the word 'wrong.' And though I most strenuously contend that the term was used by the judges as synonymous with illegal, something may be said in favour of the opinion that it means morally wrong. The language used by the judges in the earlier cases seems certainly to support the latter contention. Thus in Bellingham's case (1812) Lord Mansfield used the expression 'distinguishing between good and evil,' and in *R.* v. *Offord* (1831) Lord Lyndhurst told the jury: "to be guilty, he must have known that he was committing an offence against the laws of God and nature." So in Lord Ferrer's case the Solicitor-General Yorke actually spoke of 'moral good and evil' in a passage which was cited with approval by Sir William Follett in the course of MacNaghten's trial. Again, in his summing-up in the latter case, Lord Lyndhurst made responsibility depend upon "whether he knew that it was a wicked and wrong thing he had done; or that he was not sensible, at the time that he committed the act, that it was contrary to the laws of God and man." Sir James Stephen is strongly inclined to understand the term 'wrong' as referring to the moral character of the act. On the other hand, Lord Brougham, in the debate in the House of Lords on MacNaghten's case, clearly stated that "he knew the learned judges used the phrase with reference to the commands of the law. They could only know one kind of right and wrong; the right is when you act according to the law, and the wrong is when you break it" (Hansard's Debates, vol. 47, p. 732). Baron Bramwell staunchly maintained the same views before the Select Committee of the House of Commons upon the Law of Homicide Amendment Act ("Special Report of Select Committee," vol. 9,

p. 26, 1874). Besides, the answers themselves, I think, contain intrinsic evidence enough to recommend this interpretation. Question I. asks for a statement of the law applicable to a person "afflicted with insane delusions in respect of one or more particular subjects" who yet "knows he was acting contrary to the law." Though the term 'law' here does not seem to lend itself to misinterpretation, the judges in their reply take particular care to point out that by that expression "they understood their lordships to mean the law of the land." Does it seem credible that, in passing on to questions II. and III., they should all at once have shifted the ground from positive to moral law without giving the least warning? No doubt they used the term 'wrong' without any qualification or explanation, because having once and for all made it clear that they had no concern with anything but the law of the land, they might well believe there was no further room for uncertainty as to their meaning. Moreover, the passage in answers II. and III.: "If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered on the principle that every one must be taken conclusively to know it, without proof that he does know it;" can have but one meaning: The knowledge of the criminality of the act, *i.e.* that such act is wrong by the law of the land, is the true test of imputability where insanity is set up as a defence; and this is the proper question to be submitted to the jury—answer to question II. But for Heaven's sake do not submit it to the jury in these terms—answer to question III.—for, if you do, the jury will acquit the prisoner unless they believe that he has made an actual study of our criminal law. Don't therefore speak to them of a knowledge of legal wrong. Enlighten them by what must appear to the initiated a bit of mystification. Don't give them food which is beyond the strength

of their stomachs. Right and wrong without more is all their feeble digestion can manage. Again, answer IV. lays down the rule that a person suffering from partial insanity is irresponsible or responsible, according as to whether the state of facts with respect to which his delusion exists would or would not, if real, justify or excuse his act by the law of the land. In my idea, the maxim laid down in answer IV. is but the application to a special case of the general principle established by answers II. and III.; and if the narrower rule obviously relates to the law of the land, it seems unreasonable that the wider doctrine should be held to refer to some other standard. And, finally, as will be shown in a later chapter, upon principles of general jurisprudence, it is certainly preferable to make the legal character of the act the test; and if the question of construction of the term 'wrong' in the judges' answers can really still be considered as an open one, it is this meaning of the word that should be chosen. I may already here point out, however, that those colonial codes that embody the rules in MacNaghten's case, have failed to decide in favour of the one or the other alternative. The codes of Canada and New Zealand, as well as the codes of such of the American States as follow English law, use the term 'wrong' without qualification or explanation. The Gold Coast has sought to escape from the dilemma by speaking only of knowledge of "the nature or consequences of the act" and omitting knowledge of its wrongness altogether; whilst India and the Sudan have chosen the smoothest path by exempting from punishment a madman who is incapable of knowing "that he is doing what is either wrong or contrary to law."

CHAPTER III.

FOREIGN LAWS.*

"De Paris au Pérou, du Japon jusqu'à Rome."

ARGENTINE.

Penal Code of 1886. Art. 81. The following are exempted from punishment:—

(1) Anybody who has committed the deed in a state of lunacy, somnambulism, absolute imbecility or complete involuntary drunkenness; and generally whosoever has both resolved upon and consummated the act in a state of confusion of the senses or of the intellect from any cause whatsoever, provided it is not attributable to the actor's own fault, provided also that, whilst being in such state, the actor was not conscious of his act or of its criminality.

AUSTRIA.

Criminal Code of 1852. Paragr. 2. The act or omission is not imputed as a crime:

(*a*) If the actor is completely deprived of the use of his reason;

(*b*) In case of intermittent confusion of the senses, if committed during a period of confusion;

(*c*) If committed whilst the actor was in a state of complete drunkenness not contracted with the intention

* Except where otherwise stated, I am personally responsible for the translation of the foreign texts.

to commit the crime or in some other state of confusion of the senses in which the actor did not know what he was doing.

Paragr. 46. Extenuating circumstances which refer to the person of the actor:

(*a*) If the actor is less than twenty years of age, if he is of feeble intellect, or if his education has been greatly neglected.

Draft Code of 1874. Paragr. 56. An act is not punishable if, at the time of doing it, the actor was in a state of unconsciousness or if his mental faculties were arrested or disturbed by disease, provided he was thereby disabled from freely determining his will or from understanding the punishable character of his act.

(1) Though insanity is not mentioned in terms in the Austrian code, (*a*) and (*b*) in Paragr. 2 are understood to apply exclusively to cases of mental disease, other states of mind which may negative responsibility being dealt with in (*c*).

(2) The term 'reason' in Paragr. 2 (*a*) is understood to cover all mental faculties, will as well as intellect. Hence impulsive insanity excuses no less than intellectual insanity. The qualifying term 'completely' in the same paragraph does not refer to the degree of disturbance of mind which excuses; it means no more than 'permanently.' Paragr. 2 (*a*) provides for cases of permanent mental alienation; Paragr. 2 (*b*) for the intermittent or recurrent forms. Hence the Austrian law arrives in a circuitous way at the same result which in France follows directly from the text of the code.

(3) According to the theory of the Austrian code, insanity excuses merely because it negatives one specific element in the conception of crime, viz. the malicious intent.

(4) Under the provisions of Paragr. 319 of the Code of Criminal Procedure, where the question of insanity is raised in the trial, a special question dealing with the prisoner's state of mind must be put to the jury.

BELGIUM.

Penal Code of 1867. Art. 71. There is no infringement of the law if the accused or prisoner was in a state of mental alienation at the time of the deed, or if he was constrained by a force which he could not resist.

A reproduction of Art. 64 of the French code, with some verbal alterations made, no doubt, with the object of expressing it in the purest Bruxelles French.

BOLIVIA.

Penal Code of 1834. Art. 13. Circumstances which destroy criminality or culpability are such as exempt actors and accomplices, whether aiders and abettors or accessories before or after the fact, from all criminal responsibility and all liability to make restitution. They are, in addition to those expressly declared to be such by the law in particular cases, the following:—

(2) To commit the act, whilst in a state of lunacy.

(7) To commit it, whilst being asleep or in a delirious state or whilst being deprived of the use of one's reason in any other manner independent of the actor's will.

Art. 15. The following are regarded as circumstances which reduce the degree of criminality, in addition to those described as such by the law in particular cases:

(1) The youth of the criminal; poor mental gifts or a defective education.

(2) Poverty, love, friendship, gratitude, thoughtlessness or a storm of passion where such influence was instrumental in bringing about the commission of the crime.

The following information as to the theory and practice of the Bolivian law has been kindly supplied to the author by Colonel Pedro Suarez, Bolivian Minister in London:—

(1) The law regards lunatics in the same light as children under six years of age, and, therefore, looks upon them as being without discernment.

(2) Where a criminal offence has been committed by a person whose mental condition was never before suspected, but who was carried away by some ungovernable passion; or where there is otherwise reason to believe that his mind is deranged, a medical expert is directed to inquire whether or not the prisoner was in his right mind and conscious of his actions. Should this examination

prove the prisoner to be of unsound mind, he is freed from all responsibility criminal or civil.

(3) When the criminal is a madman or a confirmed idiot, he is not responsible (either criminally or in damages) and is not amenable to justice; but the persons in charge of such delinquent are civilly liable for his acts upon the principles of quasi-delict.

(4) If found insane, the delinquent is in all cases sent to an asylum.

BRAZIL.

Criminal Code of 1890. Art. 27. The following cannot commit crimes :—

(1) Those who, by reason of congenital imbecility or of senile decay, are utterly incapable of imputableness.

(2) Those completely bereft of their senses or of their intellect at the time of committing the crime.

BULGARIA.

Criminal Code of 1896.* Art. 41. An act is not imputable if the actor, at the time of doing it, was unable to understand its nature and significance or was prevented, by arrested development or confusion of the mental faculties or unconsciousness, from controlling his actions.

CANADA.

Criminal Code of 1892. Sec. 11. No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission was wrong.

(2) A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusion

* Translated after Hoche ("Handbuch der gerichtlichen Psychiatrie").

caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

(3) Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

CHILI.

Penal Code of 1874. Art. 10. The following are exempted from criminal responsibility:—

1. Lunatics and those demented unless they have done the act during a lucid interval, and such as, for some cause independent of their will, were completely deprived of their reason.

CHINA.*

Lunatics are held responsible for their acts; the usual sentence is passed upon them in the ordinary way. So far, then, lunacy is no defence. But the penalty is commuted, *e.g.* in murder to imprisonment with fetters, subject to His Majesty's pleasure.

On the other hand, there seems to be a very drastic system of preventive measures. The relatives of a lunatic are bound, under heavy penalties, to notify the case to the authorities, and lunatics are, in general, required to be manacled.

COLUMBIA.

Penal Code of 1891. Art. 29. The following are excusable, and not, therefore, subject to any punishment:—

(1) Those who, at the time of doing the act, were in a state of genuine dementation or lunacy, or deprived, through no fault of their own, of the use of their reason.

* From Alabaster ("Notes and Commentaries on Chinese Criminal Law").

COSTA RICA.

Penal Code of 1880. Art. 10. The following are exempted from criminal responsibility :—

(1) Lunatics and those demented unless they have done the act during a lucid interval, and such as, for some cause independent of their will, were completely deprived of their reason.

This article is identical with article 10 of the Penal Code of Chili.

DENMARK.

Penal Code of 1866. Paragr. 38 (1). Acts are not punishable if committed by persons who are insane, or whose mental powers are either so imperfectly developed or weakened and disturbed to such an extent that it cannot be assumed that they were aware of the criminal character of their acts, or who were unconscious at the time of the act.

Paragr. 39. A milder punishment than that provided by law is to be awarded in the case of imbeciles and other persons who, though not completely deprived of consciousness, yet cannot, by reason of particular states affecting the freedom of will, be assumed to have been, at the time of the act, in possession of that responsibility which exists in the mentally normal adult.

EGYPT.

Penal Code of 1883. Art. 63. The accused is exempted from the application of legal punishment if it is proved that he was in a state of mental alienation at the time of doing the act.

Art. 65. There is neither crime nor offence if the accused was constrained by a force which he could not resist.

In these two Articles the Egyptian code reproduces the provisions of Art. 64 of the French Code pénal. But whilst, in

dealing with compulsion (Art. 65), it copies the exact terms of the original, it adopts a different wording with respect to the subject of insanity (Art. 63). Nor is this difference one of language merely; it affects the practical working of the law in two important respects:

(1) "The accused is exempted from the application of legal punishment." Unlike in France, mental alienation does not in Egypt prevent the act from being "even the shadow of a crime"; it is merely a matter of excuse, a ground of exemption from punishment.

(2) "If it is proved." Positive proof of mental alienation is required in Egypt; if the matter is left in doubt, the accused must be convicted.

FINLAND.

Penal Code of 1889.* Ch. III. Paragr. 3. An act is not punishable if committed by one who is insane or deprived, through senile decay or some other similar cause, of the use of his reason.

If a person is labouring under an accidental confusion of the senses to such an extent as to have lost consciousness, an act done by him, whilst in such unconscious state, is not punishable.

Paragr. 4. If a person who has committed a crime was not, at the time of committing it, in the full possession of the use of his reason, though he cannot be considered irresponsible under the provisions of Paragr. 3, punishment is to be awarded according to the principles laid down in Paragr. 2.

But a state of intoxication and other similar states of mental confusion attributable to the actor's own fault, cannot be regarded as grounds for such reduction of punishment.

(Paragr. 2 provides: If a crime has been committed by a person who has completed the fifteenth, but not the eighteenth year, then, if such crime is capital or punishable with penal servitude for life, sentence of penal servitude of from two to twelve years is to be passed. In other cases, the punishment must not exceed three-fourths of the maximum punishment for

* Translated after Hoche ("Handbuch der gerichtlichen Psychiatrie").

such crime, nor be less than the minimum fixed for each kind of punishment in Chapter II. If the crime is such as can only be punished with penal servitude, imprisonment may be awarded instead, for a period not exceeding three-fourths of the maximum for which sentence of penal servitude may under ordinary circumstances be passed in the case of such crime, but so nevertheless that the sentence must never exceed four years, nor fall below the minimum for which imprisonment may be pronounced.)

These paragraphs of the Penal Code of Finland are fashioned upon the model of Paragrs. 4, 5, and 6, of Chap. V. of the Penal Code of Sweden. The system of punishing lunatics whose responsibility is attenuated according to the principles applicable to youthful offenders between fifteen and eighteen years of age is peculiar to and characteristic of both.

FRANCE.

Penal Code of 1810. Art. 64. There is neither crime nor offence if the accused was in a state of mental alienation at the time of doing the act, or if he was constrained by a force which he could not resist.

(1) The ground of immunity of the insane is authoritatively stated to be the absence of criminal intention. "Every crime," say the "Motives" (vol. ii. p. 37), "consists of act and intention. In the two cases provided for in this Article, the accused could not have entertained any criminal intention, since, in the one, he was deprived of his moral faculties, and, in the other, superior force has alone directed the exercise of his bodily powers."

(2) "There is neither crime nor offence." "The Article lays down that an act ceases to be of a criminal character . . . if the actor did not enjoy the plenitude of his intellectual faculties, or, in short, if he has acted without discernment." ("Motives," vol. ii. p. 48.) The act of a madman is not a crime; it is not, therefore, here a question of mere excuse or exemption from punishment; insanity is a matter of justification, and a deed, otherwise criminal, if done by a lunatic, does not even constitute a breach of the law. From this doctrine the following important consequences result:—

(*a*) If, in the course of the preliminary inquiry, the magistrate gains the conviction that the accused is a lunatic, he must at once discontinue all criminal proceedings; for such conviction is equivalent to the conviction that no crime

has been committed. It is only where he is in doubt that he may commit the prisoner for trial.

(*b*) The question—sane or insane?—need not be specially put to the jury; for since the act of a madman is not a crime, a verdict of not guilty exactly and accurately meets the facts of the case, and it is immaterial whether he has or has not done the deed imputed to him. And the judge is not bound to put such a special question even if the defence demands it; for "by asking the jury whether the prisoner is guilty, one impliedly asks if he is sane, and whether his will was free and independent at the time of the act" (Decisions of the Cour de Cassation of March 11, 1813, and September 23, 1847). On the other hand, the same court has, on January 14, 1817, laid down that "there is no contradiction in a verdict which declares the prisoner guilty of the act imputed to him, but at the same time finds that he was in a state of mental alienation at the time of doing the act. In this case the judge merely wished to give expression to the fact that the accused has been the physical author of the act." The decision of the supreme tribunal appears to be a concession made to common sense, and the commissioners entrusted with the revision of the Penal Code seem to have completely sacrificed the logic of doctrine to the logic of facts, if they suggest in Art. 55. Paragr. 2. of the Penal Code Amendment Bill, that "the state of insanity is to be submitted to the jury as the subject of a special question, either *ex officio* by the judge, or on the application of the defence."

(3) "Mental alienation." The term used by the court is *démence;* but the word is not here employed in the narrow sense which it bears in medicine, but as synonymous with mental alienation. By a series of decisions of the Court of Cassation it has been laid down that the expression must be given the widest possible meaning, and it is understood to comprise "the whole of the possible derangements of the intellect, all varieties of lunacy, every kind of mental affection" (Foville); in practice it covers everything which the alienist chooses to call *démence.*

(4) Yet "the sovereign appreciation of the question whether mental alienation exists, belongs to the judges of fact", and they are not bound by the opinions of the professional expert. They alone have to choose between the acquittal of a lunatic who has not committed a crime and the conviction of a person of sound mind who has broken the law. Nor is their decision upon this point subject to the control of the superior tribunal.

GERMANY.

Criminal Code of 1871. Paragr. 51. There is no punishable act, if, at the time of doing it, the actor was in a state of unconsciousness or of morbid disturbance of the mental faculties which excluded the free determination of his will.

(1) "There is no punishable act."—The Reichsgericht has laid down that these words must be construed literally: the act of a lunatic is not merely not a crime, it is not even an act of which the courts can take notice; in legal parlance we cannot speak of an act where that which a person does, does not originate in his free will; such doings stand for the purposes of the law on exactly the same level as those of any other irrational creature. (Decisions of the Reichsgericht in Criminal Causes, vol. xi., p. 56 *seq.*, and vol. xxi., p. 14.)

From the opening words of the paragraph thus understood flow the following corollaries:—

(*a*) Since the act of a lunatic has no existence in law, nobody can be convicted for taking part in it as a principal in the second degree or as an accessory, or of inciting or attempting to incite to its commission; and it makes no difference whatever whether such accomplice did or did not know that the principal actor was mentally deranged; for the reason of his being dispunishable is that objectively no act exists the commission of which he could have aided and abetted in or which he could have procured, commanded, or incited to (Decisions, xi., 56). But if the deed is actually done, the person who induced the lunatic to do it, may be convicted as a principal in the first degree; for he has himself committed the crime through the instrumentality of an innocent agent. This is the view taken by the Supreme Court of Germany; but though supported by the bulk of professional opinion, it has been challenged by Herzog and others, who interpret the words "there is no punishable act" in a subjective sense as referring specifically and exclusively to the actor, and who believe that all the legislator meant to convey was that "so far as the actor himself is concerned, there is no punishable act" where the conditions of Paragr. 51 are fulfilled.

(*b*) In order to convict, an act must have been committed of which the criminal law takes cognisance; and it is for the prosecution to show that such an act has been committed. Now, a madman's act is not such an act. Hence the onus is not on the prisoner of showing that he can claim immunity under the provisions of Paragr.

51. The judge, if he has any suspicion, is bound *virtute officii* to order an inquiry into the accused person's mental state; and the faintest doubt as to his freedom of will is enough to ensure his acquittal.

(*c*) Since a verdict of guilty implies that a punishable act has been committed, and since a madman's deed is neither an act nor punishable, it follows that, in trial by jury, a special question tending to elicit a finding as to the prisoner's condition of mind must not be put. (Decisions of the Reichsgericht of January 15, 1880, and June 27, 1881, vol. ii., p. 170, and vol. iv., p. 400.)

(*d*) The German law negativing, in the cases provided for in Paragr. 51, not merely responsibility, but the very existence of the act itself, it leaves no room for preventive measures being taken against the lunatic once he is acquitted. The task of taking such steps as are required in the interest of society, is entrusted not to the tribunals, but to the administrative bodies. "And if the very same act which the court has just declared to be non-existing, gives occasion to the administration to interfere with a lunatic, the latter places itself, formally at any rate, in opposition to the results of the judicial investigation." (Kreuser.)

(2) "Morbid disturbance of the mental faculties."—Though in strictness the word 'disturbance' implies that that which has been disturbed, had once been intact, the term is clearly meant to cover arrested mental development. Indeed, the "Motives" inform us that it was with this object that the legislator chose the expression "morbid disturbance of the mental faculties" in preference to "mental disturbance." "Whilst the term 'mental disturbance' cannot well be said to include idiocy and imbecility, the use of the words 'morbid disturbance of the mental faculties' does away with this difficulty. Arrested mental development too depends upon morbid influences." The expression used in the paragraph is understood to be wider than insanity in the strict sense of the word and to comprise not merely diseases of the mind proper, but also bodily illnesses which may be attended with derangement of the mental powers, such as febrile disorders, certain neuroses, narcotic poisoning, etc.

According to the prevailing doctrine, in cases of genuine insanity, the free determination of the will is conclusively presumed to be absent: as soon as it is proved that the prisoner is suffering from mental disease proper, all criminal proceedings have to be abandoned or the accused must be acquitted. It is only in cases of morbid disturbance of the mental faculties which cannot strictly be termed insanity, that the free determinability of the will has to be resorted to as the criterion of responsibility. (Olshausen, Berner, etc.) Others, however, hold that freedom of will is the general test applicable to all cases where the mental functions are deranged.

The Reichsgericht has laid down that moral insanity as meaning an incapacity to assimilate ethical notions does not confer immunity under the provision of this paragraph. ("Decisions," vol. xv. 97.)

(3) The Code, in providing that the prisoner's capacity freely to determine his will is to be the criterion of responsibility, does not specifically refer to the particular act with which he is charged; and it is not, therefore, necessary that the deed should be proved to be the outcome of the mental disorder; it is enough if freedom of will *in abstracto* is abolished by mental derangement.

(4) In order to excuse morbid disturbance of the mental faculties must *exclude* the free determination of the will; the Code does not provide, either by way of exemption from or by lessening of responsibility, for cases where the will, without being destroyed, is weakened by mental disease. The Criminal Code Bill in its original form contained a clause dealing with such cases; Paragr. 47 ran in the following terms: "If, at the time of doing the act, the actor was in such a state as interfered with the free determination of his will, without destroying it, punishment is to be awarded according to the principles applicable to criminal attempts." But the article was suppressed in committee. Such conditions may, however, be taken into consideration by the jury as a ground for giving the accused the benefit of extenuating circumstances or by the judge in awarding punishment.

GOLD COAST.

Criminal Code of 1892. Sec. 53. A person accused of crime shall be acquitted on the ground of insanity—

(1) If he was prevented, by reason of idiocy, imbecility, or any mental derangement or disease affecting the mind, from knowing the nature or consequences of the act in respect of which he is accused; or

(2) If he did the act in respect of which he is accused, under the influence of an insane delusion of such nature as to render him, in the opinion of the jury or of the court, an unfit subject for punishment in respect of such act.

In perusing the section for which the answers of the English judges in MacNaghten's case have served as a model, the reader will be struck with the peculiar provision that whilst the question of general insanity (1) is apparently one for the jury, criminal responsibility, where a specific insane delusion is relied upon as a defence (2), depends upon the opinion which either the court or

the jury forms as to the prisoner's mental state: in the latter case, and in the latter case alone, the judge may obviously withdraw the case from the jury or stop it, if satisfied that the condition of mind of the accused justifies such step. Moreover, whilst in the case of general insanity the knowledge test is to be applied, the Code fails to provide any criterion by which the question of responsibility is to be answered in the case of specific delusions, but gives the court and the jury an absolute discretion to convict or acquit, so long as the act constituting the offence was influenced by or is connected with the subject of the delusion.

GREECE.

Penal Code of 1835. Art. 86. An act cannot be imputed to those who were not, at the time of doing it, in possession of the use of their intellect. To this class belong especially—

(1) Those suffering from mania, paranoia, complete or partial, or in general from any disease of the mind or mental weakness which entirely excluded the free use of the intellect.

(2) Those who are prevented by mental defect from understanding the consequences of their acts, or from knowing the criminal character of the same.

(3) Those who, through senile decay, have lost the use of their reason.

(4) Those who did the act whilst in a state of confusion of the senses or of the mind not attributable to their own fault, and excluding the knowledge of the nature of their acts or of the criminal character thereof.

Art. 87. If it appears clearly and unambiguously from all the circumstances that owing to any of the states of mind specified in the preceding article, the intellectual powers are not completely abolished, but nevertheless substantially disturbed and weakened to such an extent that from such cause the conditions for the application of the full punishment provided by law be wanting, a lighter punishment than that provided by law is to be inflicted, the reduction being in proportion to the

deviation from the normal standard of responsibility proved to exist in each individual case.

The Greek code is not merely old; it is, so far as our subject is concerned, distinctly antiquated and a model of what a code should not be. We find surviving in it more than one peculiarity characteristic of legislation of times gone by, but which in other countries a process of revision has long since swept away. The following points deserve attention.

(1) The Arts. 86 and 87 do not deal merely with the subject of insanity; they provide in quite general terms for all causes which may deprive the actor of the use of his intellect, provided only (see Art. 86 (4)) they are not dependent upon the will of the actor himself. Insanity is introduced merely as an example, as an important species illustrating the genus. Yet

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(2) In dealing with insanity, the Code descends to pathological details with a minuteness hardly found in any other modern code. Its classification of mental disorders is peculiar and extremely perplexing to the medical mind. In Art. 86 (1), after expressly mentioning a few common types of lunacy, it provides for all those suffering "from any disease of the mind or mental weakness," and one would have certainly thought that this general formula was wide enough to embrace every conceivable form of mental alienation. But the Greek code seems to have a medical theory of its own. In (3) special provision is made for those affected with senile dementia, while (2) deals with the subject of 'mental defect.' What variety of insanity is left to be covered by this term, I am sure no physician will be able to tell.

(3) The test varies with each group of mental states specified. Whilst under the general clause in Art. 86, it is enough in order to secure an acquittal that the prisoner was not in possession of his intellect, it appears from Art. 87 that nothing but a complete destruction of the intellectual powers will excuse, a mere disturbance of such faculties being only a ground for reducing punishment. So, in the case of disease of the mind or mental weakness, the Code negatives responsibility if the free use of the intellect was entirely excluded thereby, in the case of senile dementia if the use of the reason is lost; but in the mysterious form of 'mental defect' and in the other states of mind, the question of responsibility is to be determined by the knowledge test,—with this apparently senseless distinction, however, that in (2) ignorance of the consequences of the act or of its legal character is required, whilst in (4) the nature of the act is mentioned instead of the consequences. Yet the rule hidden behind all that verbosity and the confusion of the multifarious criteria is simple in the extreme. If by any cause independent of the will of the actor, by mental disease, for instance, the intellectual powers are destroyed, the act is not punishable; and the intellectual powers are deemed to be destroyed if the actor is, owing to any such state of mind, prevented from understanding the nature and

consequences of his act or from knowing the criminal character of the same. In other words, the Code excuses only cases of intellectual insanity, and among them only those which come up to the knowledge test.

(4) Disturbance of the intellectual powers from any cause, not attributable to the actor's own fault, which does not abolish the faculty of discerning right from wrong, is merely a ground for mitigation of punishment. (Art. 87.)

GUATEMALA.

Penal Code of 1877. Art. 4. There is no offence if the actor was in a state of mental alienation at the time of doing the act.

Practically a reproduction of the first half of Art. 64 of the French Penal Code.

HAWAIIAN ISLANDS.

Penal Code of 1850 (Revised Edition of 1869). Chap. IV., Sec. 3. Any person who, by reason of his idiocy or mental imbecility, is not competent to discern the nature and criminality of an act done by him, shall not be held criminally responsible for such act.

Sec. 4. Any person acting under mental derangement, rendering him incompetent to discern the nature and criminality of an act done by him, shall not be subject to punishment therefor: provided, however, that if any such person, while capable of discerning the nature and criminality of any act, entertained the intent to do the same, and subsequently does it in pursuance and execution of such intent he shall be held responsible therefor, though the same be done in such a state of mental derangement; and also if any person voluntarily or heedlessly induce the mental derangement by intoxication or otherwise.

HAYTI.

Penal Code of 1835. Art. 48. There is neither crime nor offence if the accused was in a state of mental alienation at the

time of doing the act, or if he was constrained by a force which he could not resist.

A verbatim copy of Art. 64 of the French Penal Code.

HOLLAND.

Criminal Code of 1881. Art. 37, Sub-sec. 1. No one is punishable who commits an act which, by reason of the defective development or morbid disturbance of his mental faculties, cannot be imputed to him.

To the uninitiated, this strangely worded clause seems to reproduce, in awkward language, the provisions of Art. 64 of the French Penal Code, and, like the latter, to exempt all lunatics. This is not so. The true meaning of the article is that the judge need not, as he is in France bound to do, acquit all persons mentally afflicted, but he is in Holland given an absolute discretion in the exercise of which he may acquit any prisoner suffering from "defective development or morbid disturbance of the mental faculties" who he thinks ought to be excused.

HONDURAS.

Penal Code of 1906. Art. 7. The following persons commit no offence and are consequently exempted from criminal responsibility—

(1) Imbeciles and lunatics unless they have acted during a lucid interval.

This clause is identical with the corresponding article (8 (1)), of the Spanish Penal Code of 1870.

HUNGARY.

Criminal Code of 1878. Paragr. 76. The act cannot be imputed to him who did it whilst in a state of unconsciousness, or whose mental faculties were disturbed and who was thereby deprived of the faculty of determining his will.

This paragraph imitates Paragr. 51 of the German Criminal Code.

INDIA.

Penal Code of 1860. Art. 84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

ITALY.

Penal Code of 1889. Art. 45. No one can be punished for an offence unless he has desired the fact which constitutes it.

Art. 46. No one is punishable who, at the time of doing the act, was in such a state of infirmity of mind as to deprive him of the consciousness of his acts or of his freedom of action.

Art. 47. If the state of mind, indicated in the preceding article, was such as greatly to diminish imputability, without however excluding it, the punishment prescribed for the crime committed is to be reduced.

(1) Art. 45 enunciates the leading principle underlying the whole of the Penal Code. Except in the case of a few unimportant transgressions which the Code makes expressly punishable irrespective of the actor's state of mind, no act can, according to Italian legal doctrine, be a crime unless the actor has both intended and desired the effect which constitutes the offence. In other words, dolus, actual malice or direct intentionality is of the essence of crime.

(2) Art. 46, which has frequently been described by foreign critics of the Italian code as a masterpiece of criminal legislation (Lacointa, Rodriguez, and others), is but the application, to the special subject of insanity, of the general principle laid down in the preceding article.

(*a*) "Mind."—According to the ministerial report on the Penal Code Bill, "the term 'mind' must here be taken in the widest sense, so as to comprise all man's psychical faculties, congenital or acquired, simple and compound, memory and consciousness, intellect and will, reasoning powers and moral sense." Hence

(*b*) "A state of infirmity of mind" includes not merely intellectual insanity, but all forms and types of mental

weakness, from imbecility to senile dementia, as well as moral insanity and impulsive insanity or "disease of the will."

(*c*) To provide for these various forms of mental disorder, two criteria of responsibility are laid down: consciousness of the act, *i.e.* the accused person's power of understanding what he is doing,—and under the application of this test those suffering from intellectual insanity escape; and secondly, freedom of action, *i.e.* a free will to meet the cases of impulsive insanity, that is to say, that form of mental disease in which the patient yields to uncontrollable impulses, without being deprived of the consciousness of his acts.

(*d*) Again, the expression "consciousness of his acts" must not be too literally understood. Strictly speaking, such consciousness is abolished only in the raving madman, the idiot, the somnambulist: under so narrow an interpretation of the term, remarks Tammasia, almost all madmen would have to be punished. What is meant, is that in order to be punishable, a madman must be aware both of the moral character and of the legal consequences of his act, and he must not merely know, but be fully alive to the immorality of his conduct. By this construction, moral insanity is made a ground of exemption.

(3) Insanity, when effective, may in Italian law produce one of two results: it may either negative or lessen criminal responsibility; and whilst Art. 46 lays down the conditions under which it excuses the actor altogether, Art. 47 deals with the subject of diminished responsibility. According to the current doctrine, the latter article applies where, by reason of insanity, either the reasoning powers or the freedom of action is impaired, though not abolished. It seems very strange that the authorities have not appreciated the fact that an action is either free or unfree, and that there can be no *tertium quid*, in other words, that an impulse is either controllable or uncontrollable, and that a question of more or less cannot here arise. Impallomeni alone, among the Italian writers, has perceived this, and he rightly remarks: "Whilst it is possible to apply Art. 47 in cases of intellectual insanity, it cannot possibly take effect in impulsive insanity or disease of the will which necessarily is always such as to exclude the freedom of action, whilst it may occur, and is indeed quite usual in madmen, that the power of appreciating the character of the act is merely diminished by disease."

JAPAN.

Criminal Code of 1907.* Art. 39. An act done by a person *non compos mentis* is not punishable. In the case of a weak-minded person the penalty shall be reduced.

LUXEMBURG.

Penal Code of 1879. Art. 71. There is no infringement of the law if the accused or prisoner was in a state of mental alienation at the time of the deed, or if he were constrained by a force which he could not resist.

A verbatim copy of Art. 71 of the Belgium Penal Code.

MEXICO.

Penal Code of 1871. Art. 34. The circumstances which exclude criminal responsibility for the infringement of penal laws are :

(1) If the accused violated a penal law whilst in a state of mental alienation which deprived him of his freedom or entirely prevented him from knowing the illegality of the act or omission of which he is accused.

(2) If a well-founded doubt exists, in the opinion of the medical experts, as to the state of the mental faculties of an accused person who suffers from intermittent insanity and violated a penal law during a lucid interval.

(4) Senile decrepitude, if the accused has thereby completely lost his reason.

Art. 42. Extenuating circumstances :

(1) Infringement of a penal law whilst in a state of mental alienation, provided the latter does not completely deprive the actor of his freedom or of

* Translation by Dr. L. Loenholm, *Japan Weekly Mail*, April 20, 1907.

the knowledge that the act constituting such infringement is illegal.

(2) If the accused is decrepit or a minor or deaf and dumb and does not possess the discretion necessary to understand fully the illegality of the act constituting such infringement.

(1) "Criminal responsibility for the infringement of penal laws."—The word penal is not, of course, here used in the same sense which it bears in English law when we speak of penal statutes; it is in this article synonymous with criminal. The words between inverted commas are, therefore, obviously tautological. I could not discover any special reason for the employment of this long-winded expression in Mexican law; but I thought it best to reproduce it in full in my English translation, remaining faithful to my principle always strictly to adhere to the terms of the original.

(2) Art. 34 (2) is remarkable in that the legislator gives the opinion of the medical expert a *vis rei judicatæ*. The judge cannot but blindly adopt, and give effect to, the views of the professional witness, and the fact that criminal responsibility is, after all, an exclusively legal notion is here completely lost sight of.

(3) Art. 34 (1) and (4) corresponds with Art. 42 (1) and (2). If one of the states of mental alienation enumerated in the former article exists, but not in such form or to such an extent that the tests of irresponsibility therein laid down are satisfied, the prisoner is given the benefit of extenuating circumstances—

(*a*) Whilst in 34 (1) the word 'entirely' is used in reference to absence of knowledge alone, the word 'completely' in the corresponding section (1) in Art. 42 applies to both freedom and knowledge. There can be no doubt that the wording in the first-named article is far preferable; for the question of freedom can only be answered either in the affirmative or in the negative; freedom is either complete or absent; partial freedom is a *contradictio in adjecto*.

(*b*) In 34 (4) senile decrepitude is made to excuse if it completely deprives the accused of the use of his reason. The corresponding section, 42 (2), gives the key to the meaning of the term complete loss of reason: reason is deemed completely abolished if the prisoner is unable to understand the illegality of his act.

MONACO.

Penal Code of 1874. Art. 61. There is neither crime nor offence if the accused was in a state of mental alienation at the time of doing the act, or if he was constrained by a force which he could not resist.

A verbatim reproduction of Art. 64 of the French Code.

MONTENEGRO.

The law contains no provisions as to the criminal responsibility of lunatics.

NEW ZEALAND.

Criminal Code of 1893 (57 Vict. No. 56). Sec. 23.

(1) Every one shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved.

(2) No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind to such an extent as to render such person incapable of understanding the nature and quality of the act or omission and of knowing that such act or omission was wrong.

(3) Any person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity under the provisions hereinafter contained, unless the delusion caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

(4) Insanity before or after the time when he committed or omitted the act, and insane delusions, though only partial, may be evidence that the offender was, at the time when he committed or omitted the act, in such a condition of mind as to render him irresponsible for such act or omission.

NORWAY.

Penal Code of 1903.* Chap. III., Paragr. 44. There is no criminal act if, at the time of doing it, the actor was unable to understand the nature and illegality of such act because his intellect either never attained its full development or became subsequently weakened, or if, from the same causes or by reason of his being under the influence of a pressing danger, of constraint or of some particular state of mind, he was no longer able to control himself.

(1) "From the same causes," *i.e.* because his intellect either never attained its full development or became weakened by disease. This wording of the Norwegian code cannot be called a psychological masterpiece. How the enfeeblement of the *intellectual* powers which does not prevent the patient from understanding the nature and illegality of his act, should be the cause of a loss of self-control, is not easy to conceive.

(2) "Of some particular state of mind."—The vagueness of this expression makes the whole provision as to loss of self-control positively dangerous. Strong passion is certainly a particular state of mind, and there would be no difficulty whatever to excuse any *délit passionné* under this proviso.

PARAGUAY.

Penal Code of 1880. Art. 146. Acts and omissions contrary to law which cannot be imputed to a person as being due to criminal intention or culpable negligence, are not subject to punishment.

Art. 147. Consequently, the following in particular are exempted from all punishment:

(2) Maniacs, lunatics and in general all those who have completely lost the use of their intellect and commit a crime in that state.

(3) Imbeciles absolutely incapable of appreciating the consequences of their acts, or of understanding their criminal character.

* After the French translation of M. du Mouceau (Paris, Rousseau, 1903).

(4) Persons who have lost the use of their intellect through senile decay.

Art. 148. For the same reasons the act is not punishable:

(3) In general whenever it has been resolved upon and consummated in a state of confusion of the senses or of the intellect, whatever its form, provided it is not imputable to the actor, provided also that, whilst in such state, the actor was not aware of the nature of the said act or of its criminal character.

(1) The co-ordination of maniacs and lunatics in Art. 147 (2) is strange. The former is to the latter what the species is to the genus.

(2) The test applicable to ordinary acquired insanity, ((2) "complete loss of the use of the intellect") and to senile dementia ((4) "loss of the use of the intellect") is different from that by which imbeciles are judged, ((3) "incapable of appreciating the consequences of their acts and of understanding their criminal character"); but this is so in appearance only. The provision is obviously fashioned upon the model of the Greek code, and here, as there, the intellect is deemed to be lost or to be completely lost, if the faculty of distinguishing right from wrong is abolished. The criterion in both articles (147 and 148) is the knowledge test. The substitution of 'nature' of the act, in Art. 148, for 'consequences' of the act, in Art. 147 (3), is also due to a slavish imitation of the Greek model.

PERU.

Penal Code of 1862. Art. 8. Exempted from criminal responsibility are those who commit the criminal act whilst in a state of dementedness or insanity.

PORTUGAL.

Penal Code of 1886. Art. 42. An act is not imputable if committed by a person under ten years of age or by a lunatic who has no lucid intervals.

Art. 43. Not responsible are:

(2) Lunatics who, though having lucid intervals, have acted whilst in a state of mental alienation.

(3) Those who, through some other cause independent of their will, were accidentally deprived of the use of their mental faculties at the time of the act.

ROUMANIA.

Penal Code of 1864. Art. 57. There is neither crime nor offence if the accused was in a state of mental alienation or in some other state which, from a cause independent of his will, deprived him of the use of his reason.

RUSSIA.

Penal Code of 1903. Art. 39. A breach of the law is not imputable to an individual who, by reason of a morbid disturbance of his mental faculties or of his being in a state of unconsciousness or of an insufficiency of his intellectual powers, the result of bodily disease or defect, was unable, at the time of doing the act, to understand the nature and significance of such act or to control his actions.

This article is one of the latest legislative attempts at dealing with the criminal responsibility of lunatics. But the problem does not appear to have been treated in a novel or independent fashion. The Russian code seems rather to have copied what was considered best in the provisions of the German and Italian codes respectively. In the description of the mental states it closely follows the former model, though somewhat amplifying upon it, whilst the psychological criteria are borrowed from Art. 46 of the Italian Penal Code.

(1) "Morbid disturbance of the mental faculties."—This expression is reproduced from Paragr. 51 of the German Criminal Code, but it is here chosen with a different object. The main reason why in Germany it was given preference over the terms disease of the mind and mental derangement, is that it was thought more naturally to cover, than would the latter expressions, conditions of arrested mental development; in the Russian code, these latter states are made the subject of separate description. The "Motives" to the Russian Draft Code explain that, as regards the question of criminal liability of lunatics, the pathological signs and symptoms, the form of disease and the differential diagnosis from other similar diseases is quite immaterial; the lawyer includes in the term 'insanity' all kinds of mental derangement

which may destroy the patient's capacity to understand what he is doing or to control his conduct. Accordingly, the somewhat vague term "morbid disturbance of the mental faculties" was chosen for the express purpose of sparing the expert alienist the task of accurately diagnosing the specific type of mental disease from which the accused is suffering, and of enabling him to pronounce himself in general terms as to whether the prisoner's mind is deranged or not.

(2) "State of unconsciousness."—The order in which the mental states excusing crime are enumerated, the interposition of unconsciousness between mental disease and weak-mindedness must strike the reader as strange and illogical. But the Russian law subsumes under this category various states which in other legal systems are reckoned among mental diseases pure and simple, such as the delirium of acute fevers, puerperal insanity, and others.

(3) "Insufficiency of the intellectual powers, the result of bodily disease and defect."—By this formula are meant the different types of weak-mindedness, congenital and acquired; and among the former varieties the "Motives" enumerate, besides idiocy and imbecility, also deaf-mutism. The commissioners refused to adopt the suggestion to substitute the term "psychical faculties" for "intellectual powers," because the former expression would extend the protection of the law to the obscure condition of moral insanity. But since the law thus refuses to take notice of defects outside the intellectual sphere, the second criterion, viz. the power of self-control, can have no application under this head.

(4) "To control his actions."—The avowed object with which this form of words was chosen, was to avoid the introduction into the code of the "controversial metaphysical notion of freedom of will."

SCOTLAND.

The law of Scotland as regards the criminal responsibility of lunatics is substantially the same as the English law on the subject. The leading case is that of Gibson (1844, 2 Broun, 332), in which Lord Justice Clerk-Hope directed the jury to find their verdict in accordance with the terms of the answers of the English judges in MacNaghten's case.

Weakness of mind * insufficient to confer irresponsibility may justify conviction for a minor offence than that with which the accused is charged, *e.g.* culpable homicide instead of murder,

* See Green's "Encyclopædia of the Law of Scotland."

or may lead to mitigation of sentence or reprieve from capital punishment. (Case of Fergusson, 1894, 1 Adam, 517.)

SERVIA.

Penal Code of 1860.* Art. 53. There is neither crime nor offence if the accused was insane at the time of consummating the act, or if his freedom of will was excluded by any other cause.

SPAIN.

Penal Code of 1870. Art. 8. The following commit no offence and are, therefore, exempted from criminal responsibility:

(1) Imbeciles and lunatics, unless they have acted during a lucid interval.

SUDAN.

Penal Code of 1899. Art. 63. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

SWEDEN.

Penal Code of 1864. Chap. V., Paragr. 4. An act committed by one who is insane or deprived, by illness or senile decay, of the use of his reason, is not punishable.

Paragr. 5. If a person, through no fault of his, falls into such a state of confusion of the senses as to abolish consciousness, an act committed by him, whilst in such state, is not punishable.

Paragr. 6. If a person who commits a criminal act, was

* After a French translation kindly supplied to the author by M. Mil. R. Vesnitch, Envoy Extraordinary and Minister Plenipotentiary in Paris.

deprived of the full use of his reason either by bodily or mental disease, by senile decay or by any other state of mental confusion into which he fell through no fault of his own, but so that he cannot be considered as irresponsible under the provisions of Paragr. 4 or 5, then, in the case of capital crimes, the provisions of Paragr. 3 are to be applied; and in the case of all other crimes, the punishment may in such case, according to circumstances, be reduced below the measure with which the act is in general visited.

(Paragr. 3 provides: If the crime has been committed by a person who has completed the fifteenth, but not the eighteenth year, then, instead of capital punishment or penal servitude for life, sentence of penal servitude of from six to ten years is to be passed.)

SWITZERLAND.

Draft Code of 1903. Art. 16, Sub-sec. 1. Whosoever, at the time of the deed, was incapable of acting rationally, and especially persons whose mental health or whose consciousness was seriously disturbed at the time of the act, are not punishable.

For a good many years it has been planned to replace the cantonal penal legislation by a single criminal code for the whole of the Swiss Confederacy, and a number of draft codes have been submitted, that of 1903 being the latest. Those most competent to judge believe that its text cannot be looked upon as final and that it will not be promulgated in its present form. Since, moreover, the subject-matter dealt with in the above clause appears to be one of the chief bones of contention, it is necessary to deal with the criminal law as in force now. This is contained in the code for the Swiss Confederation of 1853, and in the penal codes of the cantons which, with the exception of one and a half cantons, viz. Uri and Unterwalden nid dem Wald, each pride themselves in a separate and independent one.

Federal Law.

Penal Law of the Swiss Confederation of 1853. Art. 27. For acts and omissions threatened with punishment in this Code no one is punishable who has acted whilst being in a state in which he was deprived, without any fault of his own, either

of the power of discrimination or of the freedom of will. This applies especially to mania, delusional insanity, and the like.

This is the law administered in the Federal Courts only. Since the clause speaks of acts and omissions, it appears strange that it has not been thought necessary to add "or failed to act" or some similar phrase after "who has acted"; obviously a piece of slovenly drafting!

Aargau.

Penal Code of 1857. Art. 45. A crime presupposes the free will of the actor. As a general rule the free will is presumed. It is, however, presumed to be absent:

(*b*) In those whose mental powers are not sufficiently developed to enable them to understand the consequences and the criminality of an act.

(*c*) In persons completely deprived, by disease of the mind, of the use of reason.

(*d*) In those temporarily insane during the periods of insanity.

(*e*) In case of confusion of the senses or of mind, not due to the actor's own fault, provided that the actor was not aware of what he was doing or that his act was punishable.

(*g*) In those constrained, by an irresistible force, to do an illegal act.

The text of this article is remarkable; it expressly declares destruction of freedom of will to be the general ground of immunity in cases of lunacy; but the test by which the existence or non-existence of a free will is to be determined is in (*b*) and (*e*) the knowledge or ignorance of the nature, consequences, and illegality of the act, in (*c*) the complete abolition of the reasoning powers, *i.e.* in all three cases a criterion having reference exclusively to the intellect.

Appenzell.

Criminal Code of 1878. Art. 36. An act is not punishable if, at the time of doing it, the actor was deprived, by disease of the mind or by idiocy, of the power of discrimination

to such an extent as not to be aware of the punishableness of the act, or if, without any fault of his own, he was in a temporary state of unconsciousness or of complete confusion of the senses or mind.

Art. 41. If the mental faculties upon the saneness of which responsibility depends, are not abolished, but impaired and weakened by disease, *e.g.* by bodily illness having brought about a disturbance of the criminal's mental equilibrium, etc., such states do not negative responsibility, but they are nevertheless to be taken into consideration in awarding punishment and are to be regarded as circumstances greatly extenuating guilt.

Basel.

Criminal Codes for the City of Basel and for the District of Basel, both of 1873. Art. 30. There is no crime if the actor, at the time of doing the act, was deprived of the faculty of freely determining his will or of such power of discrimination as would have enabled him to know the criminal character of the act.

Bern.

Criminal Code of 1866. Art. 43. Dispunishable are those who, at the time of the act, were, without any fault of their own, in a state in which they did not know what they were doing or that that which they were doing was punishable (lunacy, idiocy, etc.), or who were deprived, through physical compulsion, threats of imminent danger or other causes, of the freedom of will.

If consciousness of freedom of will was not completely abolished, but merely impaired, then, instead of penal servitude for life, penal servitude for not less than one year, nor more than twenty years, shall be awarded.

In the case of crimes visited with other punishment, a lesser form of punishment may be awarded, in accordance with the provisions of Art. 31.

Fribourg.

Penal Code of 1868. Art. 56. No punishment whatever can be awarded:

(1) In the case of those who, at the time of the act, were in a state of insanity or afflicted with an illness or infirmity which disabled them from appreciating its consequences and its moral character.

"Insanity."—The word "démence" is here used in a narrower sense than it bears in the French Penal Code, though not with that restricted meaning which, as a term of art, it has in medicine. It is intended to signify diseases of the mind proper, as distinguished from disturbance of the mental faculties which results from bodily diseases, from the action of poisons, from the puerperal state, etc. The former excuses *per se*, the latter states only if they abolished the power of understanding the consequences and the moral character of the act.

Geneva.

Penal Code of 1874. Art. 52. There is no infringement of the law if the accused or prisoner was in a state of mental alienation at the time the deed charged as criminal was committed, or if he was constrained by a force which he could not resist.

This article reproduces, with some slight verbal alterations, the provisions contained in the French or rather in the Belgian code. In one respect it is distinctly in advance of both, viz. in that it replaces the word "démence" by a term which really expresses what the former intends to express, namely, "aliénation mentale."

Glarus.

Criminal Code of 1867. Art. 28. Not responsible are:

(*a*) Those who are deprived, by disease of the mind or by idiocy, of the power of discrimination so as to be unable to understand the punishableness of the act and such as were, at the time of the act, without any fault of their own, in a temporary state of unconsciousness or of complete confusion of the senses or mind.

Art. 29. If the mental faculties upon the saneness of which responsibility depends, are not abolished, but impaired and weakened by disease, such states do not negative responsibility, but they are nevertheless to be taken into consideration in awarding punishment in that the judge may reduce the punishment below the minimum fixed by law or may award a milder form of punishment.

Grisons.

Criminal Code of 1851. Art. 45. Criminal responsibility is wanting, and the penal laws are not, therefore, applicable:

(2) In the case of those who have committed an act forbidden by law under pain of punishment, whilst in a state in which they were deprived of the use of reason. Responsibility and punishment are therefore excluded especially in those afflicted with mania, frenzy, delusional insanity, complete idiocy, and in the case of such as were, at the time of the act, in a state of temporary but complete unconsciousness or confusion of the senses or mind, not attributable to their own fault.

Art. 50. In consideration of the illegality of the will of the actor, the punishment is reduced:

(1) If the actor was prevented, by . . . senile decay, from fully understanding and appreciating the gravity of the crime which he has committed.

(2) If, at the time of doing the act, without any previous intent to commit a crime, he was in such a state of intoxication or confusion of the senses as impaired the free use of his reason.

(3) If he committed the act whilst under the influence of a violent emotion resulting from a just cause.

In all these cases it is the duty of the judge to determine according to his own discretion whether, and in how far, one or the other of these circumstances or a concurrence of several of them justifies a more or less considerable reduction of

punishment or, in exceptional cases, even a complete exemption from punishment.

Lucerne.

Criminal Code of 1860. Art. 48. The punishableness of an act, in itself criminal, presupposes reason and freedom of will in the actor at the time of its commission.

Art. 51. An act cannot be imputed to those who have committed it whilst in a state in which they were deprived of the use of their reason. This provision applies:

(1) To those afflicted with mania, delusional insanity and in general to all persons who, at the time of doing the illegal act, were deprived of the use of their reason.

(2) To such as were completely disabled by idiocy from understanding the consequences of their acts or the criminal character thereof.

(3) To those who committed the act whilst in a state of confusion of the senses or mind, not attributable to their own fault, and in which they were not aware what they were doing or that they were committing a punishable act; this provision applies *inter alia* to complete intoxication or drunkenness, provided it is proved to have been involuntary.

Art. 52. If from all the circumstances of the case it appears clearly and unambiguously that the reasoning powers, though not completely abolished, were yet very seriously disturbed and considerably impaired, a lesser punishment than that provided by law may be awarded, the reduction being in proportion to the diminution of responsibility proved to exist, the minimum punishment being in such cases one-fourth of the ordinary minimum.

Neuchâtel.

Penal Code of 1855. Art. 39. There is neither crime nor offence if the accused was in a state of mental alienation at

the time of doing the act, or if he was constrained by a force which he could not resist.

Draft Code of 1889. Art. 70. There is no offence if, at the time of doing the act, the actor was in a state of mental alienation, or if he was, through no fault of his own, in a state of intellectual irresponsibility.

If the intellectual responsibility is merely diminished, this is to be taken into consideration in estimating the degree of criminal intention and in awarding punishment. Imprisonment may even be substituted for penal servitude.

St. Gall.

Criminal Code of 1885. Art. 23. If, at the time of committing a punishable act, the mental functions of the actor were deranged to such an extent that he did not possess the faculty of self-determination or the power of discrimination necessary to understand the criminal character of the act, the act is not punishable.

Art. 40. A lesser punishment than provided for the crime may be awarded or a milder form of punishment substituted:

(*a*) If the states provided for in Art. 23 which, if total, would completely negative responsibility, were present in a lesser, but still considerable degree.

Schaffhausen.

Criminal Code of 1859. Art. 34. Responsibility is excluded by all states in which the actor, through no fault of his, was deprived of the power of discrimination or of the freedom of will.

Art. 37. Irresponsible are such persons as are in a state of delusional insanity, mania or complete, even though merely temporary, confusion of the senses, not attributable to their own fault, or are afflicted with some illness or bodily infirmity, and are thereby deprived of the faculty of understanding or correctly appreciating the consequences or criminality of their act.

Schwyz.

Criminal Code of 1881. Art. 30. In the case of all offences criminally sanctioned, the intent, malice and illegality of the act are deemed to be necessary elements.

Art. 31. Criminal punishment may not therefore be awarded in the case of those:

(*b*) Who have committed the act whilst in a state in which they were controlled by distemper of the mind, insanity, idiocy or confusion of the senses, not due to their own fault.

Art. 33. If from the circumstances of the case it appears that, at the time of the commission of a punishable act, the reasoning powers were not abolished, but seriously disturbed or impaired, . . . criminal punishment is to be awarded; but the judge, in awarding punishment, is to take into account the diminished degree of responsibility.

Solothurn.

Criminal Code of 1885. Art. 37. There is no punishable act if, at the time of doing it, the actor was in a state of unconsciousness or of morbid disturbance of the mental faculties which excluded the free determination of his will.

A literal reproduction of Paragr. 51 of the German code.

Thurgau.

Criminal Code of 1841. Art. 22. Responsibility is excluded by any state in which the actor was not aware of the criminality of the act or was deprived of the faculty of self-determination.

Art. 42. A milder punishment than provided by law is to be awarded if those states which, if complete, would negative all responsibility, are present in a minor degree.

Ticino.

Penal Code of 1873. Art. 46. Sec. 1. A crime or offence is not imputable to him who, at the time of committing the deed:

(*a*) Was in such a state as not to know what he was doing; or

(*b*) Was constrained by a force, moral or physical, which he could not resist.

Art. 47. If the causes indicated in the preceding article have not completely negatived the responsibility of the accused, the judge is authorised, in awarding punishment, to go down from one to three degrees in the scale of punishment, according to the degree in which imputableness was diminished.

Unterwalden ob dem Wald.

Criminal Code of 1864. Art. 34. Not responsible are:

(2) Those completely deprived of the use of reason, in particular those afflicted with frenzy, mania, delusional insanity, complete idiocy, and such as were, at the time of the act, in a state of temporary complete unconsciousness or confusion of the senses or mind, not attributable to their own fault.

(4) If from all the circumstances of the case it appears clearly and unambiguously that the reasoning powers, though not completely abolished, were yet very seriously disturbed and considerably impaired, a lesser punishment than that provided by law may be awarded, the reduction being in proportion to the diminution of responsibility proved to exist, the minimum punishment being in such cases one-fourth of the ordinary minimum.

Art. 28. Punishment for a crime is reduced:

(8) . . . If the responsibility of the actor, though not abolished, is yet considerably diminished by idiocy or obscuration of consciousness, a milder punishment than that provided by law may be awarded or sentence for a shorter term passed.

Valais.

Penal Code of 1858. Art. 85. There is no infringement of the law if the prisoner was, at the time of the act, completely

deprived of the use of his reason or if he was constrained by a force which he could not resist.

Art. 86. If the alteration of the intellectual faculties of the actor or the compulsion did not reach such a degree as to negative imputableness, the court may, according to circumstances, pass a lighter sentence than provided by law for such offence, or decree that he be handed over to the civil authority with directions to watch over his conduct.

To the superficial reader it might appear as if Art. 85 were a mere reproduction, with some verbal alterations, of Art. 64 of the French Penal Code. This is not so; on the contrary, the manner in which the problem is treated in the two codes is radically different:—

(1) In France, mental alienation excuses; but no other state of mind produces that effect. In Valais, mental disease is not even mentioned; but every state of mind, whatever its form or cause, negatives imputableness which completely deprives the actor of the use of his reason. In short, the test in France is purely pathological, in Valais purely psychological.

(2) In France, mental disease excuses, whatever side of the mind is affected. The code of Valais, as appears from Art. 86, takes the intellectual faculties alone into account.

(3) In France, alteration of the mental faculties, if it has any effect at all, has that of entirely negativing responsibility. In Valais, it has not necessarily that effect; it is all a question of degree; and an abnormal state of mind may either exclude or diminish responsibility.

Vaud.

Penal Code of 1843. Art. 51. The actor or accomplice is not liable to any punishment if he is, at the time of the execution of the crime, in one of the following conditions:—

(3) If he is in a state of insanity or if he is afflicted with some disease or infirmity which renders him incapable of appreciating the consequences and the moral character of his actions.

Zug.

Criminal Code of 1877. Art. 26. There is no punishable act if, at the time of doing the deed, the actor was deprived of the faculty of freely determining his will or of such power of

discrimination as would have enabled him to understand the punishable character of the act.

If the mental powers are not completely abolished, but, nevertheless, disturbed and weakened by disease, responsibility is not excluded; but such states are to be taken into account in awarding punishment, in that the judge may reduce the punishment below the minimum fixed by law, or may award a milder form of punishment.

Zürich.

Criminal Code of 1871. Art. 44. An act is not punishable if, at the time of doing it, the actor's mental functions were deranged to such an extent that he did not possess the faculty of self-determination or such power of discrimination as would have enabled him to understand the punishable character of the act.

TURKEY.

Penal Code of 1858.* Art. 41. A person guilty of an offence is exempted from punishment upon proof that he was of unsound mind at the time when he committed the same.

UNITED STATES OF AMERICA.

The Codes of the following states contain provisions dealing with the criminal responsibility of lunatics:—

Arcansas.

Revised Statutes. Paragr. 1227. A lunatic or insane person without lucid intervals shall not be found guilty of any crime or misdemeanor with which he may be charged.

California.

Penal Code of 1872. Art. 26. All persons are capable of committing crimes, except those belonging to the following classes:—

* Translation by C. G. Walpole, The Ottoman Penal Code. London, 1888.

(2) Idiots.

(3) Lunatics and insane persons.

Identical provisions are contained in the Penal Code of Arizona, 1901, and in the Penal Code of Idaho, 1901 (sec. 4560).

Colorado.

General Laws. Paragr. 600. A lunatic or insane person without lucid intervals shall not be found guilty of any crime or misdemeanor with which he may be charged; provided that the act so charged as criminal shall have been committed in the condition of insanity.

Identical provisions are contained in the Revised Statutes of Illinois, 1883, Chap. 38, Paragr. 284, and in the Wyoming Act of 1882, Chap. 35, Paragr. 5.

North Dakota.

Revised Codes of 1895. Paragr. 8398. An act done by a person in a state of insanity cannot be punished as a public offence.

South Dakota.

Penal Code. (Revised Edition of 1903.) Paragr. 16. All persons are capable of committing crimes, except those belonging to the following classes:—

(3) Idiots.

(4) Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them, they were incapable of knowing its wrongfulness.

Paragr. 18. A morbid propensity to commit prohibited acts existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts forms no defense to a prosecution therefor.

Identical provisions are contained in the Statutes of Oklahoma, 1893, Arts. 1852 and 1854.

Georgia.

Criminal Code of 1895. Paragr. 35. A lunatic or person insane, without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged: provided the act so charged as criminal was committed in the condition of such lunacy or insanity; but if a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals as if he had no deficiency.

Paragr. 36. An idiot shall not be found guilty or punished for any crime or misdemeanor with which he may be charged.

Idaho.

The provisions of the Code are identical with those of California.

Illinois.

The provisions are identical with those of Colorado.

Minnesota.

The provisions of the Code are identical with those of New York.

Montana.

Revised Statutes. Div. 4. Paragr. 3. A person who is an idiot, or insane, is of unsound mind, and incapable of forming an intention to commit a crime.

New York.

Penal Code of 1881. Art. 20 (amended 1882). An act done by a person who is an idiot, imbecile, lunatic, or insane is not a crime.

Art. 21. A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was labouring under such a defect of reason as either

(*a*) Not to know the nature and quality of the act he was doing; or

(*b*) Not to know that the act was wrong (Amended 1882).

Art. 23. A morbid propensity to commit prohibited acts existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts forms no defense to a prosecution therefor.

Identical provisions are contained in the General Statutes of Minnesota, 1894. Paragrs. 6302, 6303, and 6305.

Oklahoma.

The provisions of the Code are identical with those of South Dakota.

Texas.

Penal Code. Paragr. 39. No act done in a state of insanity can be punished as an offence.

Wyoming.

The provisions are identical with those of Colorado.

To attempt to give a complete and accurate account of the law prevailing in the United States in respect of the criminal responsibility of lunatics, is to embark on a difficult, not to say hopeless, task; and this for several reasons. Not only do the rules vary from state to state, but even within many of the states individually they appear subject to fluctuation. This is to a large extent true of those states where criminal codes are in existence, no less than of those where the penal law has remained uncodified, and is contained in a number of decisions, not infrequently of a conflicting character. In some instances, indeed, the term Penal Code is a misnomer, applied as it is to a mere compilation of definitions of crimes and their punishments. But even in states where the Criminal Code contains a general part, its provisions have, in most of them, to be explained and supplemented by case law. Take, for instance, the clauses dealing with our subject in the codes or statutes of Arkansas, California, Colorado or Illinois which, read by themselves, produce the impression that, adopting the rule of the French Penal Code, they identify insanity and irresponsibility. Nothing can be farther from the truth: there is not a single one among all the states where some test is not, expressly or impliedly, laid down, which a lunatic must satisfy in order to escape liability. The American law, however, disguises the true condition of things by declaring, in practically every state, that madness is a ground of non-imputability, and then supplying in the form of a so-called definition of madness what is in fact a criterion of responsibility. In New York and Minnesota such definition is contained in the Code itself; in those states named above, as in some others, the Code is content with laying down in general terms that a crime committed by a lunatic is not

punishable, and tacitly refers the reader to the body of judiciary law for information as to who is legally to be called a lunatic.

According to the principles upon which the criminal liability of lunatics is determined, the states may be divided into three groups:—

The first is composed of those in which the answers of the judges in MacNaghten's case have been adopted as law and as a complete statement of the law. The right and wrong test is recognised as the sole criterion of responsibility, or, in American phraseology, of sanity, in the United States courts, as well as in the majority of state courts, viz. in Arkansas, California, North Carolina, South Dakota, Delaware, Idaho, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, Oklahoma, Oregon, Tennessee, Virginia, Wiskonsin, and in the District of Columbia. In spite of some decisions in which the non-concurrence of a responsive will in a prisoner whose intellect was clear, or irresistible impulse was held to excuse, Georgia (but see *Flanagan* v. *State*, 103 Ga. 619) and Texas (but see *Harris* v. *State*, 18 Tex. App. 287) must still be reckoned in this group. It must, however, further be observed that wrong the knowledge of which is the standard of responsibility, is in many cases understood to mean morally wrong; thus, in the well-known case *The United States* v. *Guiteau* (United States Court for the District of Columbia, 1882. 10 Fed. Rep. 161), Cox, J., laid down the law in the following terms: "If you find from the whole evidence that, at the time of the commission of the homicide, the prisoner, in consequence of disease of mind, was incapable of understanding what he was doing or of understanding that it was wrong—as, for example, if he was under an insane delusion that the Almighty had commanded him to do the act, and in consequence of his delusion he was incapable of seeing that it was a wrong thing to do—then he was not in a responsible condition of mind, but was an object of compassion and not of justice, and he ought to be now acquitted." Finally, the canon determining the relations of specific delusion to criminal responsibility has not found

universal acceptance in those American courts which, otherwise, follow the rules of the English law.

To the second group belong those states in which the effect of mental disease upon the emotions and the will is recognised, and the power of the accused to control his conduct is placed, as a second criterion, by the side of the knowledge test. Irresistible impulse was first admitted as a defence by the supreme court of Massachusetts per Shaw, C.J., in *Commonwealth* v. *Rogers* (1844); next in *Commonwealth* v. *Mosler*, in Pennsylvania, by Gibson, C.J. (1846, 4 Barr. 266); and the example thus set by these two states has since been followed by Connecticut, Iowa, Kentucky, Montana, and Ohio. I may add that Iowa and Pennsylvania cling to the English rule relating to partial insanity.

The third group has clustered round New Hampshire, where in the remarkable case *State* v. *Jones* (50 N. H. 369), Judge Ladd directed the jury that "it is a question of fact whether any universal test exists, and it is also a question of fact what that test is, if any there be," a ruling followed in the same state by the more definite directions of Perley, Chief Justice, in *State* v. *Pike*, that the jury must return a verdict of not guilty "if the killing was the offspring of mental disease in the defendant; that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury." Whilst thus apparently treating the criminal responsibility of lunatics as a mere question of fact, the Court of New Hampshire, by instructing the jury to acquit if they found that the accused was insane and that the act charged as criminal was the product of mental disease, has impliedly laid down a criterion of legal responsibility, viz. the existence or non-existence of a connection between mental disease and crime. Illinois, Indiana, Kansas, and Michigan have adopted this system of dealing with the problem, and Alabama, after the decision in *Parsons* v. *State* (81, Alabama Reports 577), must probably also be reckoned among its converts, though in this state the cases are most conflicting.

As I have already remarked, in a number of states the rules are not quite settled yet, but seem to vary from time to time, in a few instances from case to case. Yet I think the above grouping gives a fairly accurate picture of the actual state of the law at the moment this chapter is written. The reader who wishes to study the case law of the United States cannot do better than consult the excellent summary of Louis E. Binnse in Godkin's "System of Legal Medicine," where copious references to the leading decisions in the various states will be found. I must, however, remark that in the eight years which have elapsed since its publication, the law in a good many states has undergone changes. Though the vast majority of states still adhere to the English model, a tendency has been noticeable for states where formerly the knowledge test was alone relied upon, to recognise uncontrollable impulse, whilst others, after temporarily adopting the double test, have abandoned it again in favour of the New Hampshire practice.

Again, as to the *onus probandi*, the rules are not uniform throughout the United States. In many states the prisoner who sets up a defence of insanity must prove it; but there are others where once lunacy is pleaded the prosecution must establish that the prisoner is of sound mind; and others again seem to be in a state of transition from the former to the latter practice.

URUGUAY.

Penal Code of 1888. Art. 17. The following persons are exempted from criminal responsibility:—

(1) Those lunatic or demented, unless they have acted during a lucid interval, and those who, from any cause whatsoever, independent of their will, are completely deprived of their reason.

CHAPTER IV.

A GENERAL SURVEY.

HAVING passed in review the legal provisions of more than a hundred states, we must next endeavour to bring some order into the apparent chaos. If we remember that the sources from which we have drawn are spread out over nearly a century —the French Penal Code, the oldest we have dealt with, being dated 1810, whilst the Criminal Code of Japan, the latest addition to the series, was promulgated as recently as 1907,— if we remember further that those rare and unfortunate instances apart, in which the law has attempted to anticipate the progress of science and has thus trespassed upon dangerous ground, each legal rule, at the best, reflects the doctrines and speaks the language of science as it stands at the time of its formulation, it might seem as if all attempts at classification must be hopeless. Yet if we do not permit ourselves to be dazzled by the phraseological kaleidoscope, we shall soon discover that the legislative principles embodied therein may be reduced to a very few varieties. Some formulæ, indeed, recur again and again with a monotony almost tiresome; but in many other cases where the terminology, at first sight, promises material divergencies in the treatment of the subject, a closer examination will dispel the illusion, and will convince us that after all the difference is one of form only, the underlying notion being the same. The reader who is anxious to learn of what mystification the language even of a code is capable cannot do better than study the text of Arts. 86 and 87 of the Greek Code and the notes thereto. On the other hand, we must not become slaves to mere words, so as to jump hastily to the conclusion

that where similar or even identical passages occur in two different legal systems, they necessarily mean the same thing. An instructive example in point is afforded by Art. 53 of the Servian code, which, so far as the subject of lunacy is concerned, is an almost verbatim copy of the French provision; yet the concluding part of the article, "or if his freedom of will was excluded by any other cause," clearly, though impliedly, lays down that the criterion by which the criminal responsibility of lunatics is to be determined is freedom of will; but it also follows immediately from the text that, in cases of mental alienation, freedom of will is presumed to be wanting.

Amongst the legal systems which we have examined, that of Montenegro alone contains no provision with reference to the criminal responsibility of lunatics, whilst that of China stands apart from all the rest in that insanity affords no defence, a madman who has committed a crime being merely entitled, it seems as of right, to a commutation of the sentence passed in the ordinary way, *i.e.* to a mitigation of punishment, or rather to what in the Celestial Empire is looked upon as a mitigation of punishment, by the act of the executive.

Leaving aside these two instances which from the standpoint of comparative jurisprudence are altogether exceptional, we have first of all to take notice of the striking fact that in a number of codes, chiefly of the older order, mental alienation is either not mentioned at all, or is introduced by way of example merely, as a species illustrating the genus, the rule being laid down, in either case, with reference to all states of mind which produce a given result, so that no distinction is made between those which are morbid and those purely physiological. The most characteristic instances of both types are found in the Swiss texts, Basel, Thurgau, Ticino and others not considering it worth while to specify insanity, whilst the Federal code and the codes of Bern and Unterwalden content themselves with exemplifying the principle which they enunciate, by lunacy or by some particular forms of it. It is unnecessary to give a full list of legal systems displaying this peculiarity;

for however far-reaching may be the consequences of a plan which completely obliterates the boundaries between normal and abnormal mental conditions, and though I shall have occasion in later chapters to touch upon the subject, for purposes of mere classification, it appears a negligible trait, since we are not dealing with the grounds of exemption from punishment in general, but with one specific ground only, and it does not, therefore, make any difference for our purposes whether the rule is laid down in respect of insanity as such, or in respect of a number of states of mind of which insanity is one.

The first important class of codes which claims our attention comprises those which go the whole length of declaring the victims of mental alienation incapable of committing a crime in any circumstances. The test is here a purely medico-pathological one, and as soon as the question of disease of the mind is answered in the affirmative, an acquittal must follow as a matter of course. The text which has served as a model to all members of this group is Art. 64 of the French Code, and the plan of thus identifying insanity and immunity may justly be termed the French plan. The article is reproduced, with or without slight and unimportant terminological alterations, in the codes of Belgium, Guatemala, Hayti, Luxemburg, Monaco, and of two of the Swiss cantons, viz. Geneva and Neuchâtel, whilst Turkey and Egypt, in copying it, have thrown the *onus probandi* on the prisoner. Though in the wording not mere slavish imitations of the French original, the texts of Argentine, Bolivia and Peru embody the principle laid down therein. Closely akin to it are further the provisions of those codes which, following the lead of Spain and Portugal, adopt it subject only to a reservation in favour of acts committed during a lucid interval; this which may be called the Iberian modification of the French plan we meet with in the criminal law of Chili, Costa Rica, Honduras, and Uruguay. The new code of Japan likewise declares dispunishable the acts of a person *non compos mentis*, but excepts from the latter term those weak-minded who are accorded the benefit of mitigated punishment

only. Subject to a similar provision in respect of persons of feeble intellect, the result at which Austria arrives by a circuitous route appears to be practically the same. Colombia, in exempting from liability all who have done the deed whilst in a state of dementation or lunacy, is careful to guard against an abuse of these latter expressions by insisting that the mental alienation must be genuine.

From the systems of law which exempt from punishment all lunatics without exception, we pass on to a consideration of those in which, to excuse, mental disease either must answer one of certain pathological descriptions and fall under one of certain heads of insanity expressly specified in the code, or must have attained a certain degree of severity. Here a distinction is drawn between lunatic and lunatic, but the principle of discrimination by which the question of responsibility is to be determined is likewise a purely medical one. And the test does not cease to bear this character in those cases in which the code carefully refrains from breathing the word insanity or any other term of like import, and merely directs in a general way that no one is to be punished who has completely lost the use of his reason, unless indeed the code either expressly or impliedly, like that of Greece, lays down a further criterion of a psychological character by the application of which it is to be ascertained whether the loss of reason is complete or not. For, in the absence of such further guide, the rule, as applied to the special case of insanity, means nothing more or less than this: that mental alienation is a ground of immunity if, and only if, it is complete; the question, therefore, resolves itself into one as to the degree which the disorder has attained in the case *sub judice*, and this is obviously nothing but a problem of psychiatric diagnostics. Nor does it seem to make any difference if the law, as that of Brazil, disregarding the other faculties of the mind, limits irresponsibility to those completely bereft of their intellect; in so doing, it simply prescribes that, in so far as the plea of insanity is concerned, the so-called intellectual insanity alone is to be admitted as a

defence, and even intellectual insanity is not to excuse except where the destruction of the intellect is complete—again a pure question of medical science. For examples of systems of law which enumerate the forms of mental disease that are to confer immunity, we cannot do better than turn to that storehouse of antiquated learning, the Swiss cantonal codes. The list of Grisons, reproduced in Unterwalden, comprises mania, frenzy, delusional insanity and complete idiocy, and in the first-mentioned canton it is expressly provided that senile dementia is to be a ground for reducing punishment only, not of exemption therefrom. The latest Swiss Draft Code, that of 1903, is the best instance I can give of the plan of making it a condition of irresponsibility that mental disease must be of a certain severity; here morbid disturbance of the mind does not protect unless it is serious. The same principle prevails in Swedish law; for though Chap. V. Paragr. 4 of the code, read by itself, seems to suggest that the plan adopted is that of the French law, not only the wording, but the very existence of Paragr. 6 which reduces punishment in the case of those deprived, by mental disease, of the full use of their reason, would be inexplicable, unless the word 'deprived' in the first-named paragraph means 'completely deprived.' And what is true of Sweden is equally true of Finland, the law of which is fashioned upon the model of that of the former country.

I now come to a number of legal provisions which I class under one head, though, if judged by the mere text of the laws thus ranged together under the same banner, they would appear a motley crowd. Of the first type to be studied here the Criminal Code of Holland is the best representative, though Brazil, in dealing with imbeciles and those afflicted with senile dementia, adopts the same plan, and though indications of the notion underlying it are found elsewhere. Art. 37 of the Dutch law declares dispunishable acts which, by reason of the actor's insanity, cannot be imputed to him; in other words, irresponsible are those who on account of mental alienation are irresponsible. The solution which the Dutch lawyer would

give of this conundrum would be that the word 'irresponsible' at the beginning of the sentence means legally irresponsible, at the end of the sentence psychologically irresponsible, the theory that responsibility is an inherent quality of the mind being the foundation of the said article. Now, since there is no such thing as psychological responsibility, the most obvious interpretation of the said passage would be to hold that, as in France, insanity *per se* excuses. But this is not the construction put upon it in Holland; it is there understood to invest the judge with an absolute discretion to acquit a mad prisoner who he thinks ought to be excused, and we are informed that in practice the judge is usually guided, in the exercise of this discretion, by the application of the will test. However this may be, the main characteristic of the Dutch law is that, whilst seemingly laying down a test of responsibility, it leaves the matter entirely in the hands of the judge without supplying him with any help in the solution of the problem. And it is just this absence of any certain criterion, coupled with an implicit trust in the good sense of the judges, which forms the connecting link between the members of this group. Whilst in Holland the truth is concealed behind the too transparent veil of a psychological fallacy, the criminal code of the Gold Coast, within the sphere of insane delusions, avowedly makes judge and jury absolute masters of the situation. If the Dutch law in substance, though not in form, makes the criminal liability of lunatics a matter purely discretionary, the reverse of the medal is represented by those American states where, as in New Hampshire, the question of criminal responsibility is submitted to the jury purely as a question of fact. The great latitude thus apparently given to the judges of fact is in truth very materially curtailed by the accompanying direction that they are to acquit if and only if the act was the outcome of mental disease. Starting from a pseudo-psychological criterion based upon that which is not an attribute of the human mind, Holland is compelled to look to the judge for an autonomous answer to the question, responsible or irresponsible?

and the answer is, of course, given in every individual case independently of any other case. New Hampshire, on the other hand, and those American states which have copied its example, go so far as to leave it to the jury as a question of fact whether any test exists, and what that test is if any there be; but in the same breath they curtail the discretion just given by the instruction that the exercise of such discretion must be determined by the existence or non-existence of a connection between insanity and crime. A test is in truth laid down of universal application, and the problem which the jury is to solve is a purely psychological one.

Here, then, we are for the first time confronted with a psychological criterion—a criterion as wide, as vague, as indefinite as could well be imagined, but a genuine psychological criterion none the less. In the problem: Is the deed the fruit of the illness? Does any relation exist between act and disease? we see the first crude attempts at approaching the question of responsibility from the standpoint of the inquirer who seeks to penetrate into the folds of the prisoner's mind and to reproduce the working of his soul. The question no longer remains there where the science of the *diseased* mind leaves it; after the latter has done its work, the services of its sister science, that of the *healthy* mind, are requisitioned, and upon their combined efforts the fate of the accused depends. We are thus brought to the last and most important group of legal systems, where the test is a compound medico-psychological test. The states belonging to this class have gone farther than New Hampshire and its imitators; it is no longer enough for an acquittal if the jury find that mental alienation has been instrumental in bringing about the crime; the law is more exacting, and insists that the act must depend upon the disorder in one or other of certain clearly defined and specified ways. And it is but in the choice of the connecting thread or threads that the members of this group differ from one another and naturally range themselves in several subdivisions. The criteria vary somewhat in detail; but in principle they are

but two in number, and either alone or combined they exhaust the legislative methods of disposing of our subject in the systems of law which remain to be studied.

The first test is that upon which our own law relies, viz. a knowledge of the nature and quality of the act and of its wrongfulness. It may be described by the short formula 'the knowledge test,' and the system which makes the responsibility of lunatics depend upon it alone, may justly be called the English system. We meet with it not only in the codes of the British Colonies and in those American states which have adopted the rule of our common law, and in Scotland which on this question is at one with us; we find it in many legal systems which can in no way be said to be influenced by our own. As to the wording of the provision there is indeed considerable variety; thus Canada and New Zealand are particular to speak of omissions as well as of acts; the first part of the formula sometimes runs merely 'nature of the act' (Hawaiian Islands, India, Soudan), sometimes in the exact terms of the answers of the judges in MacNaghten's case, viz. 'nature and quality' (Canada, New Zealand, New York), occasionally 'nature or consequences' (Gold Coast) or 'consequences' alone (Fribourg, Vaud), whilst in Greece and Paraguay there is a change of phraseology from 'nature' to 'consequences'; and finally in Appenzell and Glarus the first limb of the formula is suppressed. On the other hand, in the code of the Gold Coast it stands alone, the wrongfulness of the act not being mentioned. The latter term represents the second half of the formula with us, in Canada, New Zealand, South Dakota, and New York; of its criminality or what amounts to the same thing, its punishableness, speak the codes of Greece, the Hawaiian Islands, Paraguay, Appenzell and Glarus; those of India and the Soudan require the actor to be ignorant that his act is 'wrong or contrary to law,' whilst the 'moral character' is the decisive factor in the cantons of Fribourg and Vaud.

An interesting place in our system of classification is occupied by the law of Aargau. Art. 45 of its code declares that

the ground upon which the immunity of lunatics is based, is the abolition of freedom of will; but the criteria of responsibility therein laid down have exclusive reference to the state of the intellect, being, in fact, but modifications of the knowledge test under various disguises. The psychological notion underlying the paragraph is apparently this: an actor is able freely to determine his will in respect of a given act if he appreciates the nature of such act; if freedom of will is destroyed, it must be so because the actor is incapable of understanding what he is about to do; and since the condition of the intellectual faculty is ascertainable, whilst the state of the will as such is inscrutable, the former is used as an index to the latter. A similar theory permeates the provisions of the Danish code; Paragr. 38 indeed simply enunciates the knowledge test by exempting from punishment those who were not aware of the criminal character of their acts; but Paragr. 39 provides for a lesser punishment in the case of those who were not, by reason of particular states affecting the freedom of will, in that condition of responsibility which exists in the mentally healthy adult. These two systems of law then form the stepping-stone from the knowledge test to the will test which they identify in a peculiar manner.

The second psychological criterion is the actor's capacity freely to determine his will. Standing by itself, as the sole test of criminal responsibility of the insane, it is found in comparatively few codes, the most important of them being the Criminal Code of the German Empire. It also occurs in the codes of Hungary and Solothurn and, as I have already mentioned, it is contained, by implication, in the Servian text. The plan of determining the liability of those afflicted with mental disease by the exclusive application of the will test deserves to be named, after the pre-eminent member of this group, the German system. We shall, however, have occasion to show that the exclusiveness is one of form only: in substance the criterion has even here a double aspect.

Finally, a very large number of states have combined the

knowledge with the will test so that a madman who satisfies either the one or the other will escape. The most general terms in which this principle is enunciated, are those adopted in the Penal Code of the Swiss Confederation which declares dispunishable the acts and omissions of those deprived either of the power of discrimination or of the freedom of will. It is curious to note that this general formula reappears in the Code of Schaffhausen (Art. 34), though Art. 37 which deals with the subject of insanity in particular, or rather with some special forms of insanity, prescribes the knowledge test alone. As a rule, however, the texts are much more explicit, and in so far as the element of knowledge is concerned, practically all the wordings with which we have dealt when considering the English system, are here again to be found. As regards the second criterion the phraseology of the German Code, viz. the free determination of the will, prevails; this expression or its equivalents occur in the codes of Mexico, of the Swiss Confederation, of the cantons of Basel and Bern, and in the Austrian Draft Code; St. Gall, Thurgau and Zuerich speak of the faculty of self-determination, Italy of freedom of action, whilst the actor's capacity to control himself, his actions, his conduct is the form chosen in Norway, Bulgaria, Russia and in those of the American states which have adopted the double test.

So much for the general principles by which the question of responsibility or irresponsibility of lunatics is determined in different systems of law. Among those, however, which do not completely exempt from liability all lunatics without exception, some sort of concession is made, in most of them, even to those madmen who cannot claim immunity. In some states, as in Mexico, Appenzell, they are accorded the benefit of extenuating circumstances, but more frequently the code expressly declares that they are entitled to a reduction of punishment. As a rule, the judge is given a very wide discretion, and occasionally he is formally empowered to go below the minimum fixed by law for the specific crime (Glarus)

or to award a milder kind of punishment (Glarus, St. Gall), or to refrain from inflicting any punishment (Grisons). Finland and Sweden have adopted the strange expedient of treating the insane who do not come up to the law's standard of irresponsibility, like youthful offenders, whilst other codes have fairly strictly prescribed the limits within which the punishment of lunatics has to move. Thus in Ticino it may be reduced by from one to three degrees, "according to the degree in which imputableness was diminished"; Lucerne and Unterwalden seek to establish a mathematical ratio between reduction of punishment and diminution of responsibility, fixing one-fourth of the ordinary minimum punishment as the limit below which the judge must in no case descend. The three cantonal codes share the error of treating responsibility as a psychological quality, and the two last-named ones are further guilty of a pseudo-scientific attempt at accuracy; for inherent qualities of the human mind, assuming for the moment responsibility to be such a one, and years of imprisonment are surely incommensurable magnitudes.

CHAPTER V.

SHOULD INSANITY EXEMPT FROM CRIMINAL RESPONSIBILITY IN ANY CIRCUMSTANCES?

"Furiosus satis ipso furore punitur."—Dig., de off. praesid. L. 14.
"Fati infelicitas eum excusat."—Dig., ad leg. Cornel. de sic. L. 12.

It may appear strange that I should find it necessary seriously to embark on the discussion of the question which I have placed at the head of this chapter. The Roman law fully recognised insanity as a ground of exemption from liability for crime, and with advancing civilisation other systems of law have followed the example of Rome, so that now, as our survey has shown, China is the only country where lunacy is no defence. But my object in introducing this question is not to consider the merits and demerits of the provisions of the Chinese law with a view to their adoption in this country; for however much one may admire the civilisation of the Middle Kingdom as a plant of purely indigenous growth, the interest which its legal institutions inspire, must, for those imbued with Western ideas, ever remain a purely speculative one and free from all desire for their realisation in our midst. Indeed, in dealing with criminal lunatics, the modern Chinese system roughly corresponds with that transitional stage in the history of our own law when insanity, though not affording a defence in point of law, was yet considered as entitling the offender to a pardon. It has not even quite reached this stage; for in China, the criminal lunatic is not entitled to a free pardon, but merely to a commutation of his sentence. The discussion of this problem is forced upon me by the fact that,

even in this country and in modern times, it has been suggested that lunatics who have committed murder should pay the extreme penalty of the law. Indeed, there is an *obiter dictum* of Sir James Stephen in his "History" in the following terms: "Little or no loss is inflicted either on the madman himself or on the community by his execution." But to those who have rightly accustomed themselves to look upon the medical profession as a race of humanitarian dreamers, it will come both as a surprise and a shock that the practical adoption of this doctrine has been seriously advanced from within its ranks. The historian Smollett M.D. expresses the opinion that "the punishment of death cannot be unjust or rigorous when inflicted on a mischievous being divested of all the perceptions of reason and humanity." "Quick, sharp, stern, cheap retributive justice," exclaims Dr. Guy, whilst commenting on this passage, "but such justice as no painter or sculptor yet imagined; the bandage very tight over the eyes, the scales nowhere. If, instead of talking of justice, Smollett had spoken of mercy he would have commanded my sympathy, though I must have withheld my assent." He would have commanded Dr. Guy's sympathy, not mine; for the mercy shown in the execution of a homicidal lunatic has only one counterpart: that evinced by the Emperor of China, who, in the case of the favoured convict, substitutes death by strangulation for beheading. It must, however, in fairness be remembered that Smollett wrote at a time when the notions, even of the medical profession, with regard to insanity and the treatment of the insane were barbarous beyond description, when even the best-conducted asylums resembled menageries where lunatics were placed in cages like wild beasts. Smollett's views, however, have been revived and clothed in a somewhat modern garment, a few years ago, by the editor of Taylor's "Medical Jurisprudence." I let him speak in his own language: "What good end can possibly be served by keeping these homicidal lunatics alive, provided we can rid the world of them by some absolutely painless and unobjectionable method? I confess I can see no

reason. . . . I wish to advocate the principle of the lethal chamber. . . . The plan I would suggest is that there should be in every prison in which executions are now carried out, and also in Broadmoor criminal asylum, one or more (preferably several) bedrooms built in such a manner as to be capable of being made practically air-tight with an opening through which artificially prepared carbon monoxide and carbon dioxide could be driven from a generating station; that prisoners condemned to death by legal and proper decision should be made to sleep in these rooms, and that during the night the asphyxiating gases should be admitted. I would further suggest that the condemned person should not under any circumstances be allowed to know which night the execution should be performed." "On the one hand I do not wish to do a homicidal lunatic to death in a barbarous and cruel manner, nor, on the other, do I think it right that a man of unbridled passions and temper should be able to earn a comfortable home for life by killing a fellow-creature, a position he can certainly attain to now." And in his "Lectures," Dr. Smith further explains his meaning: "I do not wish to be vindictive and inflict the penalty as a punishment to deter other lunatics; such a deterrent has no influence on the diseased mind. I advocate it simply for the safety of society." Now if these were the opinions of some crank, I would gladly pass them over in silence; but the fact that they are penned by Dr. F. J. Smith, who is both medical adviser to the Home Office and lecturer on forensic medicine at one of our largest medical schools, compels me to take them seriously. Dr. Smith concedes that the punishment of death does not act as a deterrent to the insane, but he fears that the prospect of a life pensionership at Broadmoor may urge them on to commit deeds of blood. Our author here indulges in groundless apprehensions. Dr. Guy well remarks that, "if the man who contemplates homicide reflects at all, he must look forward, in case of detection and conviction, to death on the gallows, to perpetual imprisonment or to a life (perhaps a long life) spent, with loss of liberty, in

the society of lunatics. This is by no means an agreeable prospect; and if I am not greatly mistaken, the only one of these alternatives that has ever proved attractive to madmen, is the very punishment of death." The hope of being done to death has indeed induced more than one lunatic to commit a crime: Hadley is the best example. The attractions of the criminal lunatic asylum have, in so far as I know, never entered into the causation of criminal offences. We must not forget that, on trials of genuine lunatics, the defence of insanity is never set up by the prisoner himself, but rather by his friends or counsel on his behalf, and that the true madman strives with all his power against the insinuation that he is bereft of his senses. This part of Dr. Smith's argument does not, therefore, deserve a serious refutation. But a deeper principle is involved in the views enunciated by him, and Dr. Mercier does him scant justice when he claims that "the proposal has a specious appearance of up-to-dateness which may captivate the unthinking; in reality it is twenty centuries behind the age." I maintain that the plan of Dr. Smith is nothing if not modern; in fact, by enunciating it, he confesses himself, may be unconsciously, a follower of the most advanced wing of the anthropological school. The class of criminals for which Dr. Smith recommends the lethal chamber, is that composed of "homicidal and dangerous lunatics"; note the term 'homicidal'! Its use is no doubt intentional, and it is characteristic; for Dr. Smith the distinction between murder and manslaughter does not exist, and 'malice aforethought' does not enter into his calculations; for he advocates the lethal chamber not in a spirit of revenge, but as a measure of social defence; not because the criminal is a wrongdoer, but because he is a dangerous being. His reasoning, and in some parts even his language, is almost identical with that of Garofalo and Ferri, the most extreme disciples of Lombroso. "If the homicidal lunatic," says the author of the "Criminologia," "is really and permanently as dangerous as the born criminal, I can see no reason for drawing a distinction between the two classes before the guillotine."

And Ferri places the principle of social defence, advocated by Smith, in the clearest light when he writes: "The wanderer, when attacked, cannot stop to inquire whether his aggressor is sane or insane; he defends himself and kills the other. So society, when faced by a murderer, cannot subordinate its self-defence to the moral guilt of that individual." Indeed, if we regard crime, as does Benedikt of Vienna, as a natural phenomenon, like water, fire, lightning and subterranean vapours—dangerous, but unavoidable,—if the criminal is born with the mark of Cain indelibly impressed upon his forehead and haunted by a destiny from which he cannot escape, then, indeed, all question of guilt disappears, and the Italian school merely carries its observations and doctrines to their logical conclusion when it refuses to recognise any difference between crime and lunacy. "Both lunatics and criminals belong to the large, pitiable family of the abnormal, the sick, the degenerate, the antisocial beings. . . . For us all criminals are responsible to society, let them be insane, passionate, or born criminals." (*Transactions of the Geneva Congress*, p. 309.) "Mankind," however, "will not be reasoned out of the feelings of humanity," and fortunately for civilisation the hypotheses of the positive school, interesting though they may appear, are still relegated to the arena of abstract speculation, and as yet the stately edifice of criminal justice stands everywhere unassailable on the solid rock of moral guilt, and the notion of wrongdoing forms its very cornerstone. It is true of English criminal law it is constantly asserted, that the moral character of an act is not an element in its conception of crime. This proposition is literally correct only as regards those trivial offences which statute has engrafted upon our common law; but with these we are not here concerned: I know of no case where the plea of insanity has been raised on an indictment for obstructing the highway or non-repair of a bridge. That defence is met with only in the most heinous of crimes, and in these, and more particularly in the case of the common law crimes, the assertion is correct only in the sense in which it is correct to

say that the human body is not identical with the human skeleton, by which assertion nobody wishes to imply that it is not the skeleton that gives to the human body shape, coherence and support: though immorality does not denote criminality, nor criminality immorality, yet criminality strongly connotes immorality, and the moral reprobation which the more serious offences call forth on all sides, is, in my idea, the strongest prop to our penal system. And as long as wrong and guilt so largely enter into our conception of crime, self-defence of society can never be the paramount object with which we inflict punishment; so long our justice is and must remain essentially retributive.

We now see that those fight the battle on much too narrow a ground who meet the argument that "little or no loss is inflicted either on the madman or on the community by his execution" with such objections as the following: that this reasoning might justify the execution of many criminals who are neither lunatics nor murderers; that it would equally apply to many a victim of hopeless, incurable bodily suffering who is but a burden to himself and to others; that the unjust execution or punishment of a lunatic is an extremely cruel act towards the man's friends and relatives; that a law which awarded a penalty to the actions of insane persons would be ineffectual, since no one either as prosecutor or witness would assist in enforcing the penalty if he could help it; that punishment inflicted upon an insane person would be so generally deemed inhuman and cruel as rather to make men desperate than to deter them from crimes; that the criminal law, the deterrent effect of which largely depends on the sentiment that it is, on the whole, humane and just, would by the execution of lunatics lose much of its authority. Till the systems of criminal law forsake the solid ground of the classical school according to which it is the criminal's guilt, not his being a danger to society, that forms the justification for his punishment, the exemption of lunatics from its sanctions must always be based upon the broad principle that where and only where there is no guilt, no wrong, no criminal intention, the immunity

of the actor follows as a necessary logical corollary. And here the criminal law is in full accord with the current morality of the age, which would be revolted in its deepest foundations by the execution of one of those unfortunate creatures in whose lives sunshine and rain are but too unevenly divided and whom an enlightened science has taught us to look upon as objects of compassion, not of punishment. "As well," says Chief Justice Parker of New Hampshire, "nay, much better might we, as was formerly done in France, institute prosecutions against the brute creation for offences committed by them and hang a beast for homicide, than to prosecute and condemn a human being who is deprived of his reason."—"Tarda sit ille dies et nostro serior aevo!"

CHAPTER VI.

SHOULD ALL LUNATICS WITHOUT EXCEPTION BE EXEMPTED FROM CRIMINAL RESPONSIBILITY?

"Minatur innocentibus qui parcet nocentibus."—Coke.
"Doceo insanire omnes."—Horace, Sat. Bk. II. 3. 81.

STARTING from the provisions of the Chinese law, I have, in the preceding chapter, discussed the question whether insanity should exempt from criminal liability in *any* circumstances. Approaching our problem from the opposite extreme, I now proceed to investigate the advantages and shortcomings of those systems of law under which insanity in itself and without more confers immunity from punishment.

The great prototype of this method of dealing with the problem is Art. 64 of the French Penal Code, the text of which, either reproduced verbatim or literally translated or with some slight phraseological modifications, has found its way into a good many other criminal codes.

At the very threshold of our inquiry I grant that extreme simplicity is an advantage which, apparently at any rate, the French system shares with the Chinese, whilst, by its unbounded elasticity, it contrasts favourably with the absolute rigidity of the latter. The French plan relieves the legislator of the heavy task of laying down a satisfactory test of criminal responsibility in cases of insanity. It disposes of that residue of cases which, under any test, however ingeniously devised and however conscientiously applied, will fail to receive an adequate appreciation and full justice. It ensures that the administration of the law automatically keeps pace with the th[illegible]stulates of advancing science; for, as Zitelmann rightly

remarks, irresponsibility which is here co-extensive with insanity, resembles but an empty vessel which receives its contents from medical science, and these contents vary with the state of medical knowledge. Furthermore, the French plan leaves to the judge a great latitude, enabling him to deal with each individual case according to its particular circumstances and on its own basis, whilst it frees the medical expert from the burdensome obligation of pronouncing an opinion on matters which are not strictly of his science and on which he frequently feels incompetent to form an opinion at all. And, finally, the doctrine that all lunatics are exempted from liability for crime, is in accord with the current of public opinion and with the views almost universally held by the members of the medical profession—at any rate in countries where this postulate is not realised in legislation.

But the meaning which the common mortal attaches to the word 'madman,' is utterly different from that of the physician when both agree that a madman ought not to be punished. In endorsing the physician's postulate, the former implies that "every act committed by a lunatic partakes of the character of the inevitable helplessness which attaches to his disease itself," and that in punishing him at all we punish him, as it were, for his illness. For the popular notion of a lunatic accurately corresponds with that picture which Tracey, J., delineated when he accorded criminal irresponsibility only to him who "is totally deprived of his understanding and memory, and doth not know what he is doing any more than an infant, a brute, or wild beast." It was in this popular sense that the word 'démence' was inserted in Art. 64 by the compilers of the Code pénal and understood, for several decades, by those entrusted with the administration of the criminal law. The 'démence' of the code was defined, in terms closely akin to those employed by Justice Tracey, as the state of "a man who cannot exercise any of the faculties of his brain and who has completely lost his understanding, his will, and his memory." The first comer was, of course, competent to make *that* diagnosis,

and as late as 1828 Elias Régnault asserted that common sense is sufficient to distinguish a madman from a person of sound mind. No wonder if the annals of French criminal jurisprudence show that in those early days of the code the judge unaided determined the question of sanity and insanity, and that nobody thought of seeking the co-operation of the medical profession in the solution of so simple a problem, even though to the physician himself of that period the word 'insanity' had an incomparably narrower signification than it bears in modern medicine. Now a madman, in this popular sense of the term, nobody outside the walls of the Celestial Empire would dream of punishing; he satisfies any of the tests which have been devised, and escapes whichever of them were adopted. A rule of law which insisted upon a lunatic coming up to that standard before according him impunity, would err, not on the side of undue liberality, but on that of undue harshness; and whilst under it no guilty person would ever be acquitted, many a lunatic who has a just claim to exemption, would feel the full harshness of a barbarous law. In truth, out of the alienist's whole family—and it is a large one—only three members come up to the popular notion of a madman—the confirmed idiot, the raving maniac, and the victim of general dementia in its highest degree.

It was, no doubt, to escape from the strait-jacket of a rule thus understood that the French law made the discovery that 'démence' is, after all, a medical term, and came, not however without a struggle, to the conclusion that, in the interpretation of this word, it ought to avail itself of the data of medical science and of the assistance of the professional expert. And whilst the French law was thus shifting its fulcrum and aiming at a new state of equilibrium in which the art and science of medicine became its main support, the latter itself had not remained idle; it had, meanwhile, enormously enlarged the idea of mental alienation; and so it came about that every scientific progress added fresh territories to the field of insanity and that, with every scientific conquest, the field of irresponsibility

received new and considerable accretions, so that a larger and larger number of prisoners obtained the benefit of the expanding medical views.

Thus the contemplation of the modern French system lands us on the problem in a new and more definite shape, and we have to consider whether it is desirable that every criminal whom medical science declares insane, should escape punishment. A short visit to any asylum will convince an observer that its inmates are almost without exception creatures utterly different from the lunatic of popular imagination; yet it will be readily granted that it is not the mildest types of insanity which find their way within its walls. The truth is that a lunatic in the ordinary conduct of life is like a rational being; he has his good and his bad qualities, and if, as a learned author remarks, the bad traits of character predominate in him, this is perhaps but an additional point of resemblance between him and the average man who is in full possession of his mental faculties. At any rate, on the whole, a madman thinks, judges, talks and acts exactly like any other person. He is readily influenced by the ordinary hopes and fears which control the conduct of ordinary people. "A person does not, when he becomes insane, take leave of his human passions, nor cease to be affected by ordinary motives; he may do an act out of jealousy, avarice, revenge." And "with comparatively few exceptions, insane persons are not only influenced, but materially controlled, by the same motives which influence and control those who are still moving in the world, and who have never been suspected of mental derangement." Not only is the vast majority of lunatics competent to appreciate the nature and quality of their acts and to distinguish between right and wrong, but also quite capable of choosing between act and forbearance and of controlling their conduct: "It is by no means rare that we learn from those who have recovered that they could quite well have abstained from many of the acts which they did whilst insane." Indeed, Meynert boldly asserts that "considering the delusions, the impulses and the passions of

the insane, there is more self-restraint inside an asylum than there is outside of it." "It is in consequence of the power of self-control which insane persons have, and of the way in which those who have the care of them elicit it, that asylums have become for the most part quiet and orderly institutions, instead of being places of disorder, fury, and violence." "What would become of us," exclaims Belloc of Alençon, "of us who direct lunatic asylums, if the doctrines of irresponsibility were to prevail even for a short period of time in our institutions? Is not our whole influence, are not all our acts there, based on the lunatic's capacity of understanding the advice which we give him, the reprimands we address to him, and of shaping his conduct accordingly? Not a day passes in the asylum which I direct, on which I do not praise, reward, reprove, admonish, restrain, threaten, and punish. . . . And in the face of these facts what becomes of that doctrine of absolute irresponsibility which we maintain constantly in the courts of justice? The only explanation which I can offer for this flagrant contradiction is the sight of the guillotine which the minister of justice never tires to display before our eyes. Seeing this extreme danger which one of our patients runs, we think we cannot do enough and we go, without perceiving it, beyond the limits of both reason and justice." So the eminent French alienist; and his views are supported at least by a majority of the leading medical writers in those countries where the medical ideal is realised in the law. In other countries physicians are in full accord with him as to the facts which underlie his argument, but very few indeed are the authors who follow him in the conclusions which he draws from them. In England, it is true, some medical writers, with more power of penetration than the rest and fully appreciating that the problem has its legal and social aspects as well as its medical side, have openly recorded their dissent from that medical absolutism which claims exemption from punishment for all those whom medical science declares insane. "Very few indeed," says Mercier, "of the insane are wholly irresponsible—by which I mean that there

are very few indeed of the insane who never ought to be punished for wrong-doing. Or to put it with brutal plainness, it is in many cases right and just to punish an insane person for wrong-doing. . . . I affirm that for very many of their misdeeds, the majority of lunatics ought to receive some punishment." And Dr. F. J. Smith confesses that his views are much more in conformity with the views of the legal profession in this country than with those held by the generality of medical men. Yet authors taking this standpoint are in a hopeless minority in this country. The orthodox medical doctrine is this, that the presence of any form of insanity whatsoever in a person charged with crime ought to be legally sufficient to exempt him from punishment. The following extracts from Savage may be taken as typical of the medical reasoning: "It must be admitted that in the majority of cases of insanity ordinary motives appeal to the person of unsound mind in a way precisely similar to that in which they affect the sane. There are patients in asylums who can be guided by anticipated pleasure or by threatened deprivation of enjoyments, and therefore who must be looked upon as so far controllable if not responsible. . . . In fact, in this way alone hospitals and asylums can be managed for the benefit of the patients. But although managed in this way, it does not necessarily follow that the extension of the belief in power of self-control is justifiable when a crime has been committed." And further: "The physician claims as a general principle that an insane person, *whatever* his delusions or other mental symptoms may be, must be considered altogether irresponsible for any criminal act he may commit." It is interesting to inquire what considerations prompt the medical mind to adopt these views; it can certainly not be the soundness of the argument by which they are supported. For it is a sophism too transparent to require serious confutation if it is claimed that the insane mind is capable of being checked by the fear of disciplinary sanctions, but not by the threat of those of the criminal law; and nobody can seriously maintain that whilst

lunatics can in general control their actions, they are incapable of doing so if the act perchance happens to be a criminal one. I think Belloc's answer, that it is the sight of the guillotine or the gallows, is only a partial explanation, though one hears the opinion fairly frequently expressed that if capital punishment were abolished, the medical profession would at once give up its extravagant claims; I think they are the fruit, not of the head, but of the heart, ripened by that overstrained and misdirected humanitarian sentiment which, over its care for the welfare of the individual, forgets the wider consideration for the welfare of society—a feeling no doubt strengthened by the conviction that the presence or absence of disease is the only question to which his science enables the physician to give an exact answer—by a lingering doubt in his mind that in many cases where the alienist, in the present state of his knowledge, fails to discover any connection between illness and crime, the latter may yet be the product of the former—by a consciousness of the shortcomings of his art which may prevent him from tracing to its true source an act, not tainted, so far as he can judge, with any abnormal peculiarity, apparently dictated by the same motives and executed in the same manner as that of any healthy person and yet the outcome of some latent delusion. I fully appreciate the weight of these conscientious objections, and I grant that until mental science has been brought to a degree of perfection which it cannot now boast, miscarriages of justice are not entirely avoidable. But this is so, whatever system be adopted, whether the law exempts from punishment all lunatics without exception, or whether it prescribes some additional criterion of criminal responsibility. Nor is this defect peculiar to the problem under consideration: it is inherent to the earthly tribunal which cannot fail to suffer from the limitations of all human knowledge. If it is conceded —and we have seen that hardly any medical man will dispute this fact—that very many acts of the insane are not insane acts at all, but spring from the same sources as those of rational beings; if it is an undisputed fact that the majority of lunatics

understands the nature and quality of many of their deeds and is quite competent to distinguish between right and wrong; if it is finally granted that very frequently lunatics are quite capable of controlling their conduct and are, moreover, influenced by fear of punishment, I think the case for holding them responsible is *pro tanto* made out. For where all these conditions occur, the lunatic's mind is amenable to the sanctions of the law; and where the threat of the law is operative and might have restrained, the law is not only entitled, but, in my idea, bound to carry its threat into effect whenever its command is disregarded.

These arguments in favour of punishment would in theory lose nothing of their force, but in practice much of their importance, if it were possible to give that which Mr. Justice Stephen sought for in vain, viz. "a definite account of the course of symptoms collectively called the disease of madness," "an accurate picture of insanity as a real disease." The phraseology employed by the learned writer sounds somewhat strange to the medically trained ear and discloses a misapprehension under which a great many lawyers labour. They imagine that there is such a thing as a disease of insanity; they fancy that lunacy is a pathological unit, such as pneumonia, small-pox, or appendicitis, an illness due to some well-ascertained cause or causes, having a definite onset and running a regular course, characterised by a certain number of specific signs and symptoms. Nothing can be farther from the truth. Insanity is not a single disease at all; it is a collective name given to a group of diseases, comprising different heterogeneous species, and each species again being composed of a larger or smaller number of varieties. And even in saying this, I say more than the present state of psychiatrics warrants. For what are here called diseases, are by no means well-defined, ultimate pathological entities, but merely collections of symptoms classed, for the sake of convenience, under heads and sub-heads in a somewhat arbitrary fashion, varying with the particular views of each individual author. And if mental medicine has not arrived at a generally accepted classification, neither has it

succeeded in formulating a definition of insanity. The French physicians, indeed, feeling unequal to the burden which the system of the Code pénal has laid upon their shoulders, have many of them found fault with the code for not containing one; they clamour for that which their colleagues in other countries erroneously reproach those systems of law which do not make insanity in itself a ground of non-imputability, with having attempted.

Now the legislator who wishes to insert such a definition in the code must do one of two things: he must either formulate a fresh one or adopt one ready made. In choosing the former alternative, he will, in substance, lay down not a definition of insanity, but an additional test of criminal responsibility under the guise of a definition of lunacy, and, by clothing the test in such form, he will be justly reproached with having been guilty of an absurdity in trying to give an authoritative legal definition of a purely medical term. The latter plan, viz. the adoption of an existing definition, could prove satisfactory in one set of circumstances only; if there existed a definition accepted, and accepted as final, by the whole or substantially the whole of the medical profession; whereas in truth, of definitions there are legions, definition there is none. I think it is for the want of a standard definition, and not merely, as Mr. Charles L. Dana believes, "a curious comment upon human vanity," that "every alienist writer feels compelled to concoct his own definition, just as every druggist has his own tooth powder and every dog doctor his own mange cure." The said humourist may not be far wrong if he claims that these attempts at definition "all amount to this and no more: that insanity is a disease of the brain in which the psychical functions are seriously impaired. In place of 'psychical functions' put some periphrastic metaphysics, and in the place of 'seriously impaired' put some technical circumlocutions, and you get the conventional definitions." "I do not deny," he adds, thereby displaying a deep knowledge of the psychology of juries, "that the latter may be practically more useful in affecting the juries."

But even if the conventional definitions are thus divested of all merely ornamental superfluities, the remaining skeleton formula is neither correct nor useful. It is not correct, because the alienist, well knowing that there are degrees of insanity, does not restrict the term to cases where the physical functions are *seriously* impaired; it is not useful, since in describing insanity as a disease of the brain, it tries to explain *ignotum per ignotius*. For the conception of lunacy as a cerebral disease, though it has very much to recommend it, remains still a mere hypothesis. To put it mildly, in many cases the pathologist fails to discover even in the *post-mortem* room, in the brains of those who during life exhibited the clearest signs of insanity, any lesions at all, or at any rate any lesions which are not likewise met with in many brains whose possessors were never in life suspected of being anything but mentally sound; and there are very few types of insanity which are attended with signs enabling the physician, during his patient's lifetime, positively to diagnose cerebral disease; in the vast majority of cases the existence of the latter is merely an inference drawn from the fact of insanity, and a definition which describes insanity as being something to the existence of which insanity itself is as a rule the only clue, cannot possibly be of any practical value. The term has hitherto resisted all attempts at definition more ambitious than the Shakesperian one—

> "To define true madness,
> What is 't? but to be nothing else but mad."

Nor can we wonder at this. *Natura non facit saltum* and, in the words of the late President of the Royal College of Physicians, "it would be scientific arrogance to pretend to say that he (the medical man) could draw a definite and universally applicable line between health and disease, . . . between sanity and insanity, and that he could range men, all of them, on one side of such line or the other." The task must appear a hopeless one if it is true that "beyond general data there is no standard of mental health, but every man is his own standard." If

this dictum of one of the ablest text-book writers is correct, Horn is right in asserting that the conceptions 'normal' and 'abnormal' are fashioned out of rubber of the very best quality. But even if it were possible to sketch accurately the average mental condition of the average man who is regarded as a rational being by his friends and neighbours, he would badly gauge the scientific temper of modern medicine who would fancy that the physician of our days contented himself with such a standard of comparison. The modern medical man is nothing if not a scientist; and in the same way as no chemist would think of asserting that a given solution is free from prussic acid when his tests reveal merely the very faintest traces of this substance, so any deviation, however trivial, from the ideal mental equilibrium must of necessity strike as morbid the medical observer nurtured at the bosom of natural science; and in trying to apply the theoretical data of his science to the solution of the practical problems of forensic medicine, he is not able completely to free his mind from the fetters of biological reasoning. In the best of cases, the personal equation cannot be eliminated which will cause one expert to declare as sane a prisoner whom another, more rigorously adhering to the scientific notions of the naturalist, will pronounce a lunatic. Here we are at one, and I think not the most barren, root of the conflicts of evidence of scientific experts, and also at one of the sources from which springs that peculiar theory according to which all crime partakes of the nature of disease. The practical conclusion which is forced upon us by the fact that in questions of insanity everything is a matter of degrees and of imperceptible transitions, is clearly this, that the mere subsumption of a prisoner under so loose a term ought not to ensure him immunity from punishment, but that an independent and more concrete test, as a safeguard against the too luxuriant overgrowth of psycho-pathological notions, is an indispensable postulate of sound criminal jurisprudence. The law cannot admit those fluctuating distinctions and that independent appreciation of each individual case which may suffice

to the philosopher and to the physician; in law, where everything must become the subject of fixed rules, the need of a clear and precise criterion enabling us with some certainty to sift the wheat from the chaff must be apparent. For, be it well understood, under the French system the medical opinions expressed in the witness-box are more than mere expert evidence; they become, in practice, almost of necessity, the verdict of the court: when the medical oracle has spoken, its utterances acquire, by the identification of insanity and irresponsibility, spontaneously *vim rei judicatae.* Mental alienation *per se* confers immunity; and "the question whether such alienation exists is foreign to the domain of law; it belongs exclusively to psychological medicine. . . . The criminal law cannot do otherwise than accept the conclusion of the latter." (Garçon.) So also Saleilles: "It is not a question of metaphysical appreciation, but of medical expert evidence; the object of the inquiry is to ascertain . . . a state of mental alienation no further characterised; to prove its existence is entirely the business of the physician."

If we want to appreciate clearly what all this means, we must remember how often the plea is used in cases in which there is not the slightest excuse for advancing it,—that nearly in every capital charge, when every other defence appears hopeless, this one is put forth as a last resource,—that, to wrench from the arm of punitive justice the millionaire felon, an adroit counsel will not hesitate, where the medical vocabulary happens to be short of an appropriate expression, to coin a term to fit the occasion; if joined with some Latinised locative designation, derived from the place where the crime was committed or the trial is held, the word 'dementia' lends itself admirably to an attempt thus to delude the jury. Supported by mere "sophistry and flimsy rubbish, unworthy of being dignified by the name of argument," in countries where insanity without more excuses, the plea has yet every chance of success if impressed with the hall-mark of expert evidence; and Wharton is right if he says: "The reports of our criminal

trials show that there is not a case in which it was necessary to rely on some extravagant and unique psychological theory to make out a defence, in which such theory was not sustained by experts." And this result may ensue even though the expert be a man of undoubted integrity and scrupulous uprightness. For he cannot do otherwise than express in the witness-box the opinions he happens to hold: however heterodox these may be, to him at least they are articles of scientific faith. Let him belong to that school which, drawing its inspiration from the idea of Plato that the wicked owe their wickedness to their organisation and education, so that not they but their parents and instructors should be blamed, and from the father of medicine himself who maintained that there was no vice but was the fruit of madness, now advances the doctrine that criminal desire is always a mental disease, and his scientific convictions will compel him to declare insane every single criminal whose mental condition he is called upon to testify to, even though the crime itself be the only evidence of madness. The practical outcome of such teachings is well summed up in Wharton's paradox: "Under such a system, only the innocent could be convicted of crime; for only the innocent could be pronounced free from this psychical peculiarity." And yet, only to name two English authorities of the highest standing in mental medicine, Drs. Maudsley and Savage are among those who "would make mad the guilty." What else can it mean if the latter writes: "It would be well if the law would look more frequently at crime as symptom of insanity rather than compel experts to discover other collateral evidence of insanity"? But take the best type of medical expert, the physician who, steering clear of all such heresies, steadily pursues a middle course over the rough seas of scientific controversy: his evidence will accurately represent the average contemporaneous opinion of the profession; but will it not, all the same, be impregnated with all the errors which, for the time being, pass as current coin amongst medical men,—infected with the *deliramenta doctrinae* which were yesterday,

for the first time, solemnly proclaimed to and enthusiastically received by some learned assembly, and are to-day taught as accepted and established truths in the schools as well as in the medical press, only to be discarded to-morrow? Shall every will-of-the-wisp which, for a time, turns medical science from the path of truth and progress, be faithfully reflected in the mirror of criminal justice? How often has it not been bawled into the judges' ears that there is a form of insanity which whilst leaving intact the intellectual faculties, works havoc with the moral side of the mind? And where are now the alienists who still cling to that belief? Nay, turn to the best established principles of mental science: how often must the expert confirm the extravagant claims of an artful defence, merely because, in the present state of knowledge, he is unable clearly to define the limits of the applicability of such principle! Is there a more firmly established doctrine than the influence of heredity in the production of mental disease? And how has it been abused in criminal trials! What happens is this: "Men who would scant the idea of having insanity in their families, hug the notion, search the family records" and consider themselves fortunate if they succeed in unearthing the fact that a great-uncle of the prisoner's mother had been confined, for some months, in a lunatic asylum; they hope that, after some foundation has been laid for the plea of insanity by the testimony of independent witnesses who are, from personal intercourse, aware of some oddity, some eccentricity of the prisoner, such discovery will become, in the hands of an able counsel, an irrefutable proof of mental disease, and turn the scale in favour of their relative. Dr. Bucknill ("Brain," 1883) rightly remarks in discussing the case of Guiteau, the assassin of President Garfield: "If it could be clearly shown that both the man's parents and all of his four grandparents and all his uncles and aunts had been unquestionably insane, it would afford no proof whatever that the man himself had been insane," and he opines that the interests of justice would hardly be damaged if the question of hereditary transmission of mental

diseases were excluded altogether in judicial inquiries. With the latter part of his statement few medical men will agree. Does not the alienist in his own consulting-room, when called upon to advise in a case of mental disease, carefully investigate the patient's whole genealogical tree into its most remote branches, being fully convinced that, after passing generations, the hereditary taint may have capriciously selected the subject of his inquiry, and that lunacy in collaterals is almost as conclusive proof as madness in one of the ascendants? How—do I ask—can the physician who holds these views—and they are the orthodox settled opinions of the medical profession—and who acts upon them, when dealing with a case without any reference to legal proceedings, do otherwise in the witness-box than agree that lunacy even of a distant relative, coupled with some strangeness in the prisoner's own conduct, either in the past or present, is indicative of mental derangement in the prisoner himself? And if the medical expert is bound to go thus far, how many are those who could not, when the occasion requires it, in this way raise at least a strong suspicion that they are not of sound mind? Who could indicate where the line is to be drawn?

These serious drawbacks, though inherent to the maxim: 'insane; ergo irresponsible,' are mitigated in France and in the other countries where it has received legislative sanction, by the fact that, in all of them, medical experts are a selected class attached to the tribunals in an official capacity, and that it is by order of the court that they examine prisoners and report on their mental condition, such order being made either *proprio motu curiae* or on application of the defence, the judge having, in France at least, an absolute discretion whether to grant or refuse such application. It will be apparent that medical men known to hold extreme opinions will not as a rule be appointed to these offices, and that both their greater experience and the feeling of responsibility, engendered by their position as officers of the court, will render them proof against that temptation to which the private physician too

easily falls a victim, viz. unduly to overstretch the principle 'in dubio pro reo,' and will render them, therefore, less ready to screen every culprit. But what would it lead to if the provisions of Art. 64 of the Code pénal were, as has been suggested they should be, adopted in this country? Here where the defence is at perfect liberty to call as an expert and to parade as an authority the youngest tyro just issued out of the medical schools, who in the pride of his recently acquired degree and with a conviction begotten of ignorance enunciates, as scientific opinions, propositions which cannot be listened to, but with a compassionate smile, by his professional brethren of maturer judgment,—where, in a desperate-looking case, a skilful defence will take good care to select just such eccentric and exceptional experts who believe in some wild theory which may help out the culprit's case,—where the scientific witness called for the prisoner is in constant danger of becoming a partisan of the defence and of unduly expanding his notions of insanity if their expansiveness may become protective to a criminal with whom he happens to sympathise. 'Brain storm' is the latest discovery which Anglo-Saxon psychiatry owes to such a turn of the expert's mind on the other side of the Atlantic. Under such a system expert opinion may justly be compared to the Italian churches of olden times in which every bandit was sure to find a safe refuge. Where the circumstances prevail under which expert evidence is given in England, where every criminal who can show that he has done some strange act in the past or has attracted attention by some queer conduct, even on a single occasion, may hope, if his counsel seeks long and far enough, to find a medical man prepared to testify to his madness, it must be particularly unsafe to give *carte blanche* to the medical profession by making insanity the sole test of irresponsibility. The modern propaganda directed towards such end must be regarded as neither reformatory nor progressive, but downright destructive of the fundaments of criminal justice. For if a sufficiently high standard of soundness of mind be chosen, persons entirely

free from mental defect would form the exception rather than the rule, just as there are few men about who come up in every respect to the ideal of bodily health. A system which would accord immunity to every one who is tainted with some slight mental abnormality, would simply fill the world with irresponsible beings, would run counter to the logical consistency of any theory of crime, would endanger the safety and well-being of society and radically destroy all faith in the earnest of the penal law. "Impunitas semper ad deteriora invitat." (Coke.) If we exempt from punishment a man merely "because he be proved strange and wayward in his character, to believe himself a beggar when he may have the wealth of a Crœsus, or to be ill when he is in the buoyancy of health," even though he has the most correct notions about the outer world and his relations to it, the clearest understanding of the duties he owes to his neighbour and to the community at large, the most positive knowledge that the act he is about to commit will bring upon him the sanctions of the law: then we directly encourage him to give free play to his passions in the well-founded hope that even if the worst should come to the worst, *i.e.* even if he should be unlucky enough to be caught, the combined resources of an able counsel and of a complaisant alienist will yet land him safely in the ever-open shelter of a successful plea of insanity. By thus stretching the virtues of clemency and charity beyond their legitimate limits, society exposes itself defenceless to his onslaughts. Under such a system, truly "there is a pleasure in being mad which none but madmen know." In this country the salutary practice of compulsory confinement of criminal lunatics in Broadmoor by judicial sentence prevents the plea of insanity from being set up upon any but capital charges, and it is true that the genuine madman whose mental faculties are completely undermined, may be tempted to commit murder by the hope of being hanged, but never by the prospect of a life-long confinement in a criminal lunatic asylum; but it is otherwise with the class under consideration; in those belonging to it, 'the will to live'

is as strongly developed as in the average member of the community, and nothing short of capital punishment will deter many of them from shedding blood. It will, therefore, be apparent how unsafe it is to relax the terror of the criminal law to those who by their unstable brains and strong passions are specially prone to commit the most heinous offences, and who would have, for the same reasons, the best chance of escaping under a plea of insanity if insanity in itself meant non-imputability. "Society cannot yet afford to let every cranky borderland criminal be looked upon as an irresponsible being. There is a sociological therapeutics which demands imprisonment or hanging more strongly than psychiatrical therapeutics demands drugs and the seclusion of a retreat." (Dana.)

In a former part of this work I have insisted on the proposition that criminal responsibility is a purely legal term, and pointed out that this truth is fully recognised even in those countries where, by the identification of insanity and immunity, the boundaries between law and medicine threaten to become obliterated. Thus, in France, the judge is not, in theory, bound by the opinions of the scientific witness, and, even if he adopts them, the decision is given on his own undivided responsibility. Though the foreign reader may be puzzled to know how this judicial independence can ever be asserted where the law fails to place in the hands of the judge any test whereby he can sift the expert evidence, where the very letter of the law seems, as it were, to compel him blindly to follow the professional expert in his conclusions, the French judge is never at a loss for means of escape from the latter's tyranny; he finds them in the elastic cord of interpretation to which, in France, natural justice, doctrine, and science are the recognised guides. Translated into good English, these guides mean that the judge is at liberty to decide the case before him according to his own moral notions and metaphysical conceptions, according to considerations of general utility and public policy, or, to put it bluntly, within circumscribed, although somewhat indefinite, limits, according

to his own sweet will and pleasure. From this point of view the expert has been correctly described as a mere hyphen between the data of his science and the metaphysical conceptions of the judge. In fact, we hear once again the rapping of the metaphysical ghost of responsibility which seems to lurk in every corner, and are reminded that this is the point of contact between the French and the Dutch law. The French system, in making lunacy *per se* a ground of exemption, compels the judge to seek shelter behind metaphysical conceptions of the word 'irresponsibility,' if he does not wish to become the slave of the medical expert. 'Het Wetbock van Strafrecht,' in providing that "no one is punishable who does an act which, by reason of the defective development or morbid disturbance of his mental faculties, cannot be imputed to him," seems to prescribe an independent test of criminal responsibility. By formally making non-imputability the condition of non-punishableness, it avowedly directs the court to understand and interpret the former term in a metaphysical sense as denoting an inherent quality of the human mind; but, inasmuch as no progress of psychology will ever enable us to discover that which does not and cannot exist, irresponsibility becomes its own criterion, and in substance the criminal law of the Netherlands merely incorporates the provisions of the Code pénal, whilst hiding the fact under the guise of a too transparent tautology. The letter, at any rate, of the French law having avoided this cliff, it becomes, however, more difficult for the French judge to exercise the discretion vested in him, by overriding the opinion of the expert witness. For inasmuch as by the terms of Art. 64 insanity in itself confers immunity, the judge, in deciding against the medical evidence, pronounces not merely as responsible, but as sane, a prisoner who, in the physician's opinion, is of unsound mind. Even if not afraid of throwing himself into the metaphysical abyss, hardly a judge will care to incur the odium of rejecting the conclusions of the physician in a matter appertaining to medical science, and of making an independent diagnosis for which he is not at all qualified. To escape from

this dilemma, the French courts have, in more than one instance, gone the length of refusing to make an order for the examination of a prisoner and a report on his mental condition, when application therefor had been made by counsel for the defence; and the result of such refusals is that many cases are recorded in the annals of French criminal justice in which a confirmed lunatic has been condemned, madmen whom the most rigorous expert could not have failed to pronounce as such; madmen, moreover, who would have satisfied any test of non-imputability which has ever been devised. Examples may be found in almost every French work on forensic medicine; and the reader who wishes for a complete account of such judicial errors will find it in a little book by Drs. Pactet and Colin, entitled "Les aliénés devant la justice (Aliénés méconnus et condamnés)." No wonder that such miscarriages of justice make the French judge shy of taking this extreme step and prompt him to regard the medical expert as a kind of special jury, to whose verdict he feels bound to conform, without submitting it to the independent tribunal of his own judgment.

It is apparent, indeed, that the plan of the Code pénal of identifying insanity and irresponsibility could lead to no other result. But, in order to show that this is the actual predicament in which it has landed French criminal jurisprudence, I cannot do better than quote the following passages from a very able leaderette of *Le Matin* (Tuesday, August 20, 1907): "Since some time all criminals raise the same defence—irresponsibility. As soon as a murderer is arrested, a lawyer hastens to see the magistrate entrusted with the preliminary inquiry and shouts in his ears: 'If this man has killed, the fault is not his; he is the victim of a hereditary taint.' The magistrate entrusts one, two, three medical experts with the investigation of the case, and these at once begin measuring the prisoner's skull and look in the lines of his hands, in the fact that his ears stand away from his head, in the form of his teeth, for proofs of his irresponsibility. The question no longer is whether he is or is not guilty, but whether he is or is not normal. One is no longer contented with

discovering physiological defects, which is, after all, a question of medical science; one analyses his tastes, his phraseology, his moods, one studies his psychological habitus, as well as that of his father and mother, of his brothers and uncles. Then one decides that he is irresponsible. . . . The function of the judge vanishes. The physician carries everything before him. Thus, gradually, criminal justice has ceased to be a work of social defence, and has become a branch of comparative pathology. Our whole system has now but one basis—the infallibility of the medical expert."

Frequent protests have, indeed, been made against the practice of habitually delegating judicial functions to the medical expert; and, in spite of the exceptional position which the medical man occupies in French public and social life, in spite of the respect with which the *ipse dixit* of the physician is generally received in that country, the physician could not have remained absolute master of the situation, and the system would have proved intolerable and have broken down long before this, had not the medical profession itself well understood that the doctrine embodied in the text of Art. 64, if taken literally, is quite untenable, and acted accordingly. "The reports of the physician in his capacity as medical expert," Garraud tells us, "usually end with three conclusions:—

"(1) The first deals with the question of medical diagnosis, *i.e.* whether the prisoner is of unsound mind, and which clinical type of mental alienation the physician has discovered.

"(2) In the second he expresses his opinion about the responsibility of the prisoner. The appreciation by the physician of the criminal responsibility of the prisoner is but the logical consequence of the fact that he alone is competent to make a medico-psychological examination.

"(3) In the third conclusion, the expert applies his diagnosis of the case to the solution of the problem what precautionary measures he thinks necessary in the interests of the safety of society."

That the question of responsibility is entirely left in the

hands of the medical expert is, indeed, but the logical consequence of its identification with the question of insanity in the French law. But what is the object of submitting it to him at all? One would have thought that under the doctrine 'insane, ergo irresponsible,' he had already expressed his opinion about the prisoner's liability to punishment when he declared him sane or insane. Is the second conclusion but a superfluous repetition of the first? No; Garraud tells us that the physician alone is competent to conduct a medico-psychological inquiry;—note: not a medical but a medico-psychological inquiry;—and whilst the first conclusion deals merely with the medical aspect of the case, the second states the results of an investigation which involves a psychological as well as a medical element. But where in the Code pénal does he find the guiding hand to the solution of the metaphysical part of the problem? Nowhere; he supplies it himself and of his own authority. Fully alive to the fact that the text of Art. 64, if taken in its natural sense, would lead to results appalling in their absurdity and fraught with extreme dangers to the well-being of society, he has taken it upon himself to overrule its provisions by construing its terms not according to their clear and obvious meaning, but in the light of a metaphysical theory of his own—has developed a special conception of the term insanity *ad usum fori*, different from its ordinary signification in the practice of medicine, and by the tacit, but universal accord of the medical profession, freedom of will has become his criterion of criminal responsibility. Thus the French law, starting with the principle of the absolute irresponsibility of the insane, arrives, by means of judicial interpretation, in practice, at the same results as flow directly from the text of Paragr. 51 of the German code. The point where the French and Dutch laws meet has been indicated above. In the fact that three independent systems of law, each acting on a theory of its own, yet in practice arrive at approximately the same conclusions, we have an interesting illustration of that law of evolution for the existence of which I contend, that the

institutions of nations which are at the same level of civilisation, let them be given any direction you like, will yet, of necessity, tend to gravitate towards the same centre. Be this as it may, I think I am right in asserting that the French specimen of expert-made law is without parallel in the legal history of any other people. And whatever one may think of the desirability of entrusting the medical witness with such a vast amount of judicial discretion, so much is certain, that by inventing for itself an additional criterion of criminal responsibility in cases of lunacy, the medical profession has signed the death-warrant of that system and of that doctrine under which insanity without more is a cause of non-imputability,—in the same way as the French physicians, by loudly clamouring for an authoritative definition of the term 'insanity,' and by incessantly repeating their time-honoured demand for legislative recognition of a *tertium quid* between full responsibility and absolute irresponsibility, viz. of a diminished responsibility,—and it is significant that this latter conception is a product of the French soil—impliedly acknowledge that they are unequal to the burden which, under the provision of the Code pénal, the logic of events has laid upon their shoulders. Strange to say, hitherto even those physicians who recommend the doctrine of the Code pénal just on account of the great latitude which it gives to the judge and to the expert, have cordially approved and adopted the medical construction of its text and unreservedly endorsed both the latter claims without ever noticing that by such approbation the French system stands condemned out of their own mouth, and without suspecting that their teachings were tainted with inherent inconsistency.

Quite recently, however, the French jurisprudence of irresponsibility appears to have entered a new phase of its career. Somewhat oblivious of the share which they have themselves had in bringing about the narrow construction which Art. 64 has of late received, French physicians begin to clamour for a literal interpretation of its terms. At the last congress of alienists and neurologists, held at Geneva and Lausanne in

August, 1907, they have confessed their inability to pronounce scientifically upon the responsibility of accused persons; they assert that the professional expert has done all that can be expected of him, if he has delivered an opinion upon the morbid character of the motives that prompted the act, or upon defects of intellect or of memory which render a lunatic incapable of appreciating the nature of his deed; and they have adopted by a two-thirds majority the following resolutions:

(1) That the Art. 64 of the Penal Code, in virtue of which experts are entrusted with the examination of criminals or of accused persons suspected to be afflicted with mental disease, simply enacts that there is neither crime nor offence if the accused was in a state of mental alienation at the time of doing the act; and that the word 'responsibility' does not occur in the text;

(2) That questions of responsibility, whether thereby be meant moral responsibility or social (*i.e.* legal) responsibility, belong to metaphysics and jurisprudence, not to medicine;

(3) That the physician, though alone competent to form an opinion as to the genuineness and as to the nature of mental disturbance in the accused, and as to the influence that such disturbance could have had upon the determinations of the will or upon the acts of the said accused, has not to take cognisance of those questions.

Resolved: that the magistrates, in their orders, judgments, and decrees, adhere strictly to the text of Art. 64 of the Penal Code, and do not demand of the medical expert the solution of questions which lie outside his competence.

It will be interesting to watch the course of events in France when once the alienists carry their conscientious objections and their refusal to pronounce themselves upon the question of responsibility of accused persons from the scientific congress into the witness-box, and thus sever the only thread on which the whole fabric of Art. 64 hangs in practice. The forecast which a French judge has given is this: that where the expert pronounces the prisoner insane, an acquittal will follow as a

matter of course; where he submits facts pointing to mental alienation, but hesitates to declare the accused insane, the judge will, upon his own undivided responsibility, decide whether the prisoner is or is not guilty. But by acquitting him he declares him insane; by convicting he asserts that he is mentally sound. In other words, the judge will find himself in the very unenviable position of being compelled to make a psychopathological diagnosis, and he will have to make it, not in the clear and straightforward cases, but in those in which the alienist is in doubt, and refuses to deliver an opinion one way or another.

Under the French system, as hitherto administered in practice, the judge being *hors de combat*, the jury, in all cases where it intervenes, stands face to face with the medical expert. If the judge proves reluctant to override the conclusions of the professional witness in a matter purely of the latter's science, much less will twelve ordinary mortals feel competent to run counter to his testimony by convicting a prisoner whom he has declared insane. The danger lies in the opposite direction: in the text of Art. 64 the jury finds ready made a term elastic enough to cover its own sins, a term affording it an excuse for acquittal whenever its own sympathy and that of the public is with the accused; and von Liszt's principle "that the object of punishment is not the crime, but the criminal," is carried out with a vengence,—it is true in a sense in which that great jurist never understood it. French jurisprudence does not subscribe to the doctrine of the digest: "Ira furor brevis est," but teaches that a culprit whose mental equilibrium has been disturbed merely by the storms of human passions, is not entitled to the benefit of Art. 64. In spite of that, is it not notorious that every prisoner accused of what has been termed a *délit passionné* can be sure of a merciful verdict at the hands of a sympathetic jury? Yet the well-known dictum of Publius Syrus: "Dissolvitur lex cum fit judex misericors," applies to judges of fact as well. French criminal procedure affords the jury further facilities for sheltering under the

cloak of lunacy the belovèd criminal. If they find that the prisoner has done the act charged as criminal, but was insane at the time of doing it, they need not bring in a special verdict: 'guilty, but insane,' nor even 'not guilty on the ground of insanity'; by bringing in a verdict on the general issue, they impliedly give their finding on the question of the accused's state of mind: this is the mode of procedure approved by the Cour de Cassation in its decisions of March 11, 1813, and September 23, 1847. The commissioners entrusted with the revision of the Code pénal have indeed acknowledged the shortcomings of this practice by embodying in the Amendment Bill the following provision:—"Art. 55, Sub-sec. 2. The state of insanity must be submitted to the jury as the subject of a special question either *ex officio* by the court or on the application of the defence." Meanwhile, juries do not fail to take full advantage of the licence which the law accords to them; and if anybody feels inclined to doubt my words or to believe that I exaggerate, let me remind him of that many-headed monster, the unwritten law, which, marching under the banner of the plea of insanity, has of late made a triumphant entry in the courts wherever the French system prevails; let me remind him but of that one sensational trial which recently took place in a country which slavishly, but not always gracefully, apes everything that is French, and in which a murderer, whose guilt was as clear as daylight, was freed by that hydra from the arm of criminal justice. With the ancient Greeks with whom the distinction between a *νόμος γραπτός* and a *νόμος ἄγραφος* arose, the inherent superiority of the unwritten law was merely an article of speculative faith, affording to the philosopher food for reflection, to the tragedian ample material for dramatic conflicts; to assert its paramount claim in a legal tribunal would never have occurred even to a people gifted with such poor legal genius as the ancient Hellenic nation. To launch it forth on this new career was reserved to modern juries, and they could so launch it forth under the protecting aegis of the French system under which the cries of the street must find an

echo in the solemn atmosphere of the tribunals and under which "that great charlatan, known in these days as public opinion," glorified in the blessings of trial by jury, capriciously turns the balance of a too blind justice.

To sum up: We have seen that even amongst the inmates of asylums, that is to say amongst the victims to the more serious forms of insanity, the vast majority is guided in its actions, restrained from doing wrong and constrained to do right by the same motives which have the same effects in sane persons. And "if it is expedient to place restraint upon the conduct of sentient beings, and if the threatening of pain operates upon such conduct, the case for punishment is made out." (Bain, "Mental and Moral Science," p. 404.) We have further realised that in the same measure as psychological medicine pushes farther and farther its researches, the dimensions of the field of mental abnormality steadily expand till the world becomes full with men and women who, when weighed by the alienist, are found wanting. To screen all these *in globo*, without reference to the degree and character of their mental derangement, from the penalties awarded by the law for criminal offences is a doctrine as absurd in theory as it would be intolerable when applied in practice. The inability of the medical profession to define insanity has been advanced as an argument in favour of the system of the Code pénal. This opinion contains a *petitio principii;* for it assumes that insanity is the final question to be determined in criminal issues,—which is true only where the law identifies insanity with immunity. It has been said with reference to the English law that "in reading the cases, one cannot help being struck by the want of any recognised legal rule or doctrine by which the judge may be guided. In each case it is more or less a matter of chance whether there is a conviction or acquittal, depending partly on the severity or leniency of the particular judge who happens to try the case, partly on the state of the public feeling, partly on the composition of the jury, partly on the balance of advocacy." Whilst disinclined to agree with

Mr. Everest's opinion of the English law, I claim that whatever truth there may be in it, the evil indicated must be accentuated a thousand-fold in those legal systems where a term wanting so much in clearness and precision as the word 'insanity' is made the sole criterion of imputability. I hold that the non-existence of a sharp line of demarcation between mental health and disease, so far from supporting the claims of the French system, is, on the contrary, one of the strongest grounds for demanding that the legislature should place in the hands of the judge an independent test whereby to gauge criminal responsibility where insanity is pleaded; and I fully concur in the view of Roenne, "that in no other question does the judge stand so much in need of clear and precise rules to guide him as in that of criminal responsibility; and that when the law is silent, many a theory subversive of the very fundaments of the penal law will hold sway in courts of justice."

Before concluding this chapter, I must, in a few words, dispose of one more ground on which medical men base their recommendation of the French plan. They point out that confinement, and the hardships of life, in gaol cannot fail to prove detrimental to the mental condition of any lunatic, that it must tend to aggravate his symptoms and to accelerate the downward course of his disease; and as a great many of the insane convicts ultimately find their way to Broadmoor, why not send them there directly instead of by the circuitous route of the convict prison? My answer is that the same argument would apply to many criminals afflicted with bodily illness; that it is notorious that prison life aggravates consumption, diabetes, and heart disease, and that many of the convicts suffering therefrom have ultimately to be transferred to the prison infirmary. The correlative of guilt is and must remain punishment, and the reasoning which underlies the above demand, cannot carry any weight until the legislature, carried away by a wave of hysterical sentimentality, sees its way to establish a criminal Nordrach and a criminal Nauheim, and to enact that the diabetic criminal be sentenced to undergo a cure

in Carlsbad instead of a term of penal servitude. Till these ultra-humanitarian dreams are realised, Dr. Maudsley's dictum holds good: "If we are satisfied that our prison system is the best that can be devised for the prevention of crime and the reformation of the criminal, we may rest satisfied that it is the best treatment for that sort of insanity from which criminals suffer."

CHAPTER VII.

THE PROBLEM CONSIDERED FROM THE STANDPOINT OF GENERAL JURISPRUDENCE.

"Quo teneam vultus mutantem Protea nodo?"
Horace, Epistles I. l. 90.

"To hold all madmen responsible means the infliction of a deal of unnecessary pain; to hold all of them irresponsible is to give to a large, at any rate to a certain, number of individuals an unchecked licence to commit crimes." This passage from the work of Landry indicates a convenient way by which to approach our problem in order to discover the leading principles of general jurisprudence which underlie it. We have first to inquire what are the objects with which punishment is inflicted; for having discovered them, we know at once whom to exempt, whom to make liable: we shall excuse those lunatics whose punishment would be gratuitous cruelty, whilst the strong arm of the law ought to strike at all those whose chastisement would be consonant with, and promote, the ends for which society threatens and inflicts its penal sanctions.

Now, as to the end or final cause of human punishments, Blackstone writes: "This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the Supreme Being: but as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; or by deterring others by the dread of his example from offending in the like way, *ut pœna ad paucos, metus ad omnes perveniat;* or lastly by depriving the party injuring of the power to do future mischief. The same one end, of preventing future crime,

is endeavoured to be answered by each of these three species of punishment. The public gains equal security, whether the offender himself be amended by wholesale correction, or whether he be disabled from doing any further harm; and if the penalty fails of both these effects, as it may, still the terror of his example remains as a warning to other citizens." Whilst agreeing that prevention of crime is the paramount object of all sound criminology, I think Blackstone sees that aim and end itself under too narrow a visual angle, with the result that his statement of the ways by which that purpose is attained, is defective, the most important aspect being entirely overlooked. Nor do the three ways which he enumerates and which are adopted by Bentham under the terms 'reformation,' 'example' and 'disablement,' even so far as they go, assist us in the solution of our problem. One must be endowed with more than a healthy optimism, were one to believe for one moment in the reformatory effect of punishment upon a *bonâ fide* lunatic. Again, the punishment at any rate of a prisoner whose madness is apparent to the ordinary man, is, as our author himself remarks, a miserable spectacle, and can be no example to others; nor would the acquittal of such a one encourage others to commit crimes. And finally, where, as in this country, the fate of a prisoner acquitted on the ground of insanity is of necessity committal to a lunatic asylum, the interests of public safety are equally well served, whether he is hanged, sent to jail or to the madhouse. Few, I am sure, will agree with Dr. F. J. Smith in learning from the isolated experience of "that creature Dodwell," who, after being sent to Broadmoor for shooting at the Master of the Rolls, there made a murderous attack upon the chief medical officer, the lesson that the only safe way of dealing with homicidal lunatics is to do them to death. The aims of punishment, proximate and final, as seen with the eyes of Blackstone and Bentham, could suggest but one rule, viz. that nobody ought to be convicted whose madness admits of no doubt, or in other words, the practical maxim that the accused ought to be

acquitted whenever the experts called on behalf of the prosecution are at one with those for the defence in the opinion that the prisoner is insane.

In truth, the really effective aspect of the sanctions provided by the penal laws is not their application, but the threat which they contain; and if their genuine function is the prevention of crime, they fulfil that function essentially by determent: not so much, however, in that others are deterred from offending in a like manner by the example of the evil they see inflicted upon him who has transgressed, as in that they supply to every would-be offender *ab initio* a motive tending to counteract all those motives and desires which urge him on to the commission of the crime. Upon this theory of punishment which was first enunciated, I believe, by Kant, and fully developed by Austin, every penal sanction may be likened to a Damoklean sword hung over the head of every intending transgressor, and always ready to descend upon him as soon as by his own act he severs the single horse-hair by which it is suspended. The perpetual threat is what really matters; the object with which the sanctions are actually enforced, being merely an indirect and remote one, namely, to prevent the sword getting rusty, and to keep its edge sharp; for a blunt weapon even in that critical situation could have no terrors. The principle deducible from this doctrine then is that all those, and only those ought to be punished whom the threat of the law could or might have deterred from breaking that positive or negative command which it is intended to enforce. Applying this general maxim to the special case of lunacy, we find that the sanction must of necessity be absolutely inoperative in two sets of circumstances:

(1) Where he who transgresses the law is prevented by his mental illness or infirmity from knowing the nature and character of his act or from knowing that that which he is doing is wrong; for in the absence of such knowledge and understanding, the desire to avoid the specific conditioned evil by which the legal obligation is sanctioned, cannot possibly

enter into his calculations when he decides upon his course of action; and

(2) Where, though he may be aware of his duty, he is unable to regulate his conduct in conformity with the law, because disease has completely deprived him of the power of self-control. Such a one is no longer his own master: fully alive to the fact that his act brings him into conflict with the law, and that it exposes him to punishment, and striving with every fibre of his being to remain the lawful man, he is driven to commit the crime by the demoniacal power within him. Unable by any means at his command to avoid an infringement of the law, he ought never to be punished for an act which he could not help doing.

An examination of the objects of punishment then leads us to the conclusion that if either of the conditions just discussed is fulfilled, lunacy ought to exempt from liability. But are we correct in speaking here of a ground of exemption? I think we are not, though opinions seem to differ. Austin tells us of the grounds of exemption in general that the so-called exemption is really due to the non-existence of an obligation, that the party said to be exempted has not broken any obligation, not done any wrong, nor incurred any liability from which he can be exempted. I consider these remarks especially true in reference to the plea of insanity. Markby, on the other hand, asserts that "in the majority of cases the non-liability of insane persons cannot be rested on the absence of the elements which constitute legal liability." We have seen that among the foreign systems of law a good many support the contention of Austin that where the legal tests, if any, under which mental alienation is a ground of irresponsibility, are satisfied, the last vestige, the least suspicion of crime disappears. Thus, in France: "There is neither crime nor offence"; in Germany: "There is no punishable act"; in Norway: "There is no criminal act"; in Belgium: "There is no infringement of the law"; in Spain: "The following commit no offence," etc. And we have also seen that in some at least of the

foreign countries, this doctrine is carried to its logical conclusions. I hold this view to be the correct one, and I am prepared to maintain the proposition that a lunatic can claim exoneration only by showing that one of the ingredients in the conception of crime is in his case wanting.

Now, the constituent elements of every crime are the bodily act and the mental factor. The act of a madman, regarded in itself and without reference to the actor, does not as a rule differ in the least from that of a person of sound mind; and even in those exceptional cases in which the deed is of such a character as for one reason or another to force upon the observer a suspicion that it must be the work of a lunatic, it is relevant only in so far as it suggests an inference as to the mental state of its author. That part of the notion of crime the want of which is to confer immunity, must not, therefore, be looked for in the physical act, but in the mental element. But what is that defect in the mental aspect of wrong which is to protect the committer of a forbidden act? According to Blackstone, it is a want or defect of will or a deficiency in will, a statement for which he incurs the severe, and I think not wholly merited, censure of Austin who wishes to substitute absence of unlawful intention or inadvertence. It appears very strange indeed that the author of our standard work on general jurisprudence should thus have generalised from our own law and raised into a universal legal canon that which is peculiar to the English system, whilst, on the other hand, the Commentaries on the Laws of England contain an analysis of crime which faithfully reproduces the legal views of many a foreign country, but which is certainly not an analysis of crime as here understood. The truth is that the conception of the mental element involved in crime, wrong, guilt, varies with time and place; and it would, therefore, be quite impossible to give a general formula universally correct. The term which would probably cover most foreign systems is that borrowed from Roman law: dolus; but we must be on our guard if we find this expression again and again recurring in criminal codes of

different states, not to jump hastily to the conclusion that it bears the same meaning everywhere. I need only remind the reader that the 'dole' of the Scottish law differs very little, if at all, from our own 'criminal intention,' whilst in most continental systems the term 'dolus' denotes that state of mind which we call direct intentionality, thus connoting malice in fact, criminal motive, and that which Dr. Mercier has erected into the corner-stone of wrong-doing in English law—as it is or as it ought to be?—the *animus nocendi*. Hence if a lunatic is irresponsible because, and only if, owing to his disease one of the essentials of crime is missing, and if these essentials themselves are not identical in any two countries, it may well occur that the same madman might justly be condemned for the same crime in the one, while he would go scot-free in the other: and the cause of the difference would not be the excessive harshness of the one state or the undue leniency of the other in dealing with the victims of insanity, but the narrower or wider definition of the fundamental notion 'crime' itself. These differences become even more striking if we descend from the general conceptions of different codes to their definitions of specific crimes. To take but one example—in Germany 'premeditation and deliberation' enter into the definition of murder, and where mental disease interferes with that capacity for calm reflection which is implied in those two expressions, a prisoner would necessarily have to be acquitted though he might well come up to the English standard of responsibility. All these considerations then lead us to three conclusions:

(1) That the tests of irresponsibility which we have discovered, when analysing the objects of punishment, determine but a minimum of mental faculties which a madman must possess before he ought to be made liable anywhere and under any circumstances; but they are by no means exclusive and ought to be supplemented according to the additional mental ingredients which enter into the conception of guilt in different states;

(2) That it would be wrong in theory and inconsistent in

practice for one country blindly to copy another country's provisions as to the criminal responsibility of lunatics. The concessions made to the insane by the criminal codes and in the criminal courts are founded on the recognition of the fact that mental alienation may bring about an elimination of one or another of the constituent elements of crime; and these elements varying from state to state, it might easily come about that country A, were it without more to adopt country B's canon of responsibility, would commit the unpardonable blunder of using a criterion which serves merely as a guide to the discovery of a mental state necessary to the conception of guilt in country B, but quite foreign to it and utterly irrelevant in country A;

(3) That the exemption of the insane being based upon the absence in them or in some of them of something indispensable to the idea of crime, and that 'something' being a something mental, the only satisfactory tests of criminal responsibility applicable to the case of lunatics must be psychological tests.

The systems of law which neither, like the French Code pénal, content themselves with the sweeping direction that those mentally alienated cannot commit crimes, nor think it wise to follow the example of the Dutch code in investing the judge with an unlimited discretion to dispose of prisoners proved to suffer from disease of the mind according to his own sweet will and pleasure, have adopted one of two plans of discriminating between lunatic and lunatic; they have laid down either a medical test or one or more psychological criteria.

Of the codes which, in order to prevent an abuse of the plea of insanity, rely upon an exclusively medical check, some, *e.g.* that of Colombia, merely seek to guard against the recognition in criminal tribunals of extravagant and fantastic psychopathological hypotheses by requiring that lunacy in order to exonerate must be genuine, whilst others exact that it should be complete or have brought about a complete abolition of the

mental or, as it is sometimes expressed, of the intellectual powers, thus making liability depend upon the clinical intensity of the disorder. The language of these codes is, however, misleading; for whilst in terms they seem to restrict the benefit of immunity to Justice Tracey's lunatic of blessed memory, that is to say to him whom disease has reduced to the mental level of the brute or wild beast, their provisions are both intended and understood to protect all those in whom disease of mind is characterised by well-marked symptoms of a certain severity. At first sight it might appear that such a rough-and-ready test, founded upon the clinical aspects of the case and excusing all with whose brains illness has worked serious havoc, whilst such as suffer from a mere minor ailment would be held responsible, ought to answer the purpose well. For though under its application now and then a prisoner might escape punishment who, on a more scientific investigation, would be found to display all the elements of guilt, yet, it may be argued, such instances are of comparatively rare occurrence, and no great harm could possibly result if, in the victims of grave mental disorder, we err on the side of mercy. My answer to this is that the clinical character of a case is by no means a reliable key to its criminological appreciation: if, on the one hand, as has just been remarked, a prisoner whose mental health must, from a medical standpoint, be pronounced to have completely broken down, may yet present all those mental features essential to the conception of crime, an important ingredient therein may, on the other hand, be found wanting in one whom the alienist would declare to suffer merely from a mild form of disorder of the brain. It is in the latter class of cases where we stand most in need of a satisfactory criterion, that the purely medical test utterly fails. Nor is this all. We have seen that there is no sharp boundary line between mental health and disease, the two states passing into each other by imperceptible shades; how much more hopeless must appear the task of discovering a clear line of demarcation here where the difference is avowedly but one of degree! Who could possibly indicate the exact point

where slight disorder merges into grave disease? The task would necessarily fall to the lot of the physician; and what guarantee is there that he will keep within due bounds when pronouncing upon the severity or otherwise of a case of insanity? In the hands of a partisan witness or a faddist the term 'grave mental disorder' may become as elastic and as all-embracing as the expression 'lunacy' itself. And herein, indeed, lies the incorrigible defect inherent in every system which resorts to the pure medico-pathological test. Everything is left to the medical expert, who becomes absolute master of the situation, judge and jury becoming his mere tools, instead of the professional witness being himself, as he ought to be, subject to that control of the bench which appears indispensable to me as long as criminal responsibility is, as it must remain, an emphatically legal notion. Matters become worse when the code, instead of resting satisfied with laying down a pathological test in general terms, specifies in technical language the varieties of mental disease which are to excuse crime. This practice, characteristic of legislation of times gone by, is almost obsolete, and even where it is still met with, its worst evils are largely mitigated by the fact that the enumeration of definite forms of insanity is usually followed by general words wide enough to cover every conceivable case of lunacy: the maladies expressly mentioned then merely serve as illustrations, superfluous as such and particularly useless when it is remembered that the central figure in the decision of the case must, under this system, be the physician who does not stand in need of illumination, by means of examples, as to what is mental disorder or destruction of the mental faculties. Without the concluding general formula, a list of types of diseases of the mind, however elaborate, must be an intolerable nuisance. Such a method might have done well enough when psychological medicine recognised but a very few forms of insanity within the limited range of which every case of mental disorder, diagnosed as such, had to find a place. But since, with the progress of the science, the process of division and subdivision has been carried to a very great length,

every list, compiled in a code, must appear hopelessly incomplete. Moreover, since every alienist seems to have a classification as well as a definition of insanity peculiar to himself, apparent differences of medical opinion which are in reality mere differences of nomenclature, must constantly occur, and must be the more misleading and mischievous as not insanity as such, but only those mental diseases specified in the code excuse, and the exact medical diagnosis, therefore, becomes a matter of paramount legal importance.

The psychological tests, on the other hand, have not only the great negative advantage of being singularly free from those shortcomings inseparable from medical criteria, but they possess, in addition, very substantial positive virtues of their own. By no other means can the influence which insanity has exercised in bringing about the crime, be ascertained; and after all it is only in its relation to the act that insanity can come into question in a criminal tribunal. It has, indeed, been suggested that the existence or non-existence of a connection between disease and deed should be used as the sole criterion of the criminal responsibility or irrresponibility of lunatics. Now to trace such connection is a task which lies quite outside the province and competence of medical science. The causation, symptoms, pathology, diagnosis, prognosis, and treatment are the only problems in reference to the subject of lunacy with which the physician is concerned; and though the acts, gestures, and words, in short the general conduct of the patient supply him with valuable material for that process of induction by which he arrives at making his diagnosis, an act has no special interest for him because it happens to be criminal; nor does his professional knowledge or training in any way specially qualify him for the solution, by way of deduction, of the problem whether, and if so, how, any given act is the outcome of any given disease of mind. For this very reason, among others, it is wrong, as will be shown in one of the concluding chapters of this book, to insist, as a matter of evidence, upon strict proof that the psychological criteria are satisfied with

specific reference to the specific act charged as criminal. It ought to be enough for the professional witness to show that, according to the teachings of psycho-pathology and the experience of his practice, the prisoner does not possess sufficient intelligence to understand what he is doing, not sufficient self-control to restrain his impulses, not that freedom of will which would enable him to regulate his conduct in a rational manner; after evidence of such general character has been given, it is for judge and jury to draw therefrom the inference in relation to the deed with which the prisoner is charged. We perceive here the clear line of demarcation between medicine and law when they are brought into contact in forensic practice upon the trial of an alleged lunatic. For if, as has been stated, the only point of view from which insanity interests the criminal lawyer, is its influence upon the conduct of the accused in the very instance which is the subject of judicial investigation, the problem becomes a legal one at the exact stage at which it passes beyond the ken of the physician. And the only possible connecting link between the utterly different aspects under which questions of mental disease present themselves to the two professions, is the psychological test. Once the medical expert has pronounced an opinion as to sanity or insanity, he is essentially *officio functus;* on the wings of the psychological criterion, the inquiry passes from the arena of medicine into the legal forum. The psychological test thus accomplishes that which an exclusively medical criterion could never do; it accurately defines the respective spheres of medicine and of law, and if its function is properly understood, clearly it is alone capable of ensuring that harmonious co-operation between the members of the two professions which is essential to a satisfactory decision of the issue: 'guilty or not guilty?' when insanity is pleaded. Such being the nature and objects of the psychological element in the canons of responsibility, it will at once appear that it is not a tenable objection to insist, as medical experts have sometimes done, that the questions thus raised are not within the cognisance of psychiatrical science. Such assertion has been

made in this country in reference to the knowledge test, in Germany in respect of the will test. This claim, it might be thought, must be weak since the experience of the courts shows that, in spite of occasional protests, the majority of professional witnesses is quite willing to express opinions upon matters which, it is suggested, are foreign to the department of knowledge in which they are skilled. But granting fully the justice of such claim—and I quite agree that it is well-founded—it does not in any way detract from the value of the psychological test. For, I repeat it, such tests are tests of responsibility, not of insanity, and to apply them belongs to the province of judge and jury, not of the medical expert. And if the latter declares that the questions involved in the legal criterion are not of his art—and he must decidedly be the best judge—he is not merely within his rights, but logically consistent in refusing to answer them; for his opinion on subjects outside the scope of his science is obviously irrelevant. Hence follows that the court ought never to press an unwilling expert to deliver an opinion, but ought to content itself with putting to him questions tending to elicit such matters of fact as enable the jury, under the direction of the judge, to determine the issue of responsibility in accordance with the rule laid down by law.

The office of the psychological test is thus twofold. By means of it we ascertain first of all whether any connection subsists between disease and act or, in other words, whether the crime is induced by insanity. Such relationship being established, it serves, in the second place, to discover whether the changes wrought in the brain by the disorder were of such nature as to eliminate one or more of the ingredients in the conception of guilt. In order to be of practical use, the criterion selected must not only enable us to solve both these problems, it must fulfil one condition more; the principle which it enunciates must deal with facts ascertainable by evidence with sufficient certainty and precision for judicial purposes. A test may in theory be an embodiment of perfection; it may be founded on the highest wisdom of metaphysics, psychology

and scientific jurisprudence; it is doomed to utter failure, when applied in the practice of the tribunals, if it involves matters which for the purposes of legal adjudication are inscrutable. For, as is well remarked by Landry, "it is clear that a class of persons can be held irresponsible only if all the individuals belonging to that class are incapable of being deterred by the threat of the law and if, in addition, the class is defined by characters manifest enough to prevent any person who does not really belong to it, from flattering himself that he will be treated as a member of that class. . . . To decide upon the responsibility or irresponsibility of criminals, one must always cling to such characteristics as are apparent and unambiguous."

If I sing the praises of the psychological criteria, I wish it to be clearly understood that I speak of them exclusively as tests of imputability applicable to the case of lunatics and of lunatics alone. I have not a single word to say in favour of those codes which lay down general psychological canons of irresponsibility, not with specific reference to the subject of insanity; and it does not make very much difference whether the law altogether omits to mention lunacy or whether mental alienation is introduced by way of illustration, or lastly whether the test is declared to be applicable to insanity and all other states of mind or, in the strange terminology of the Norwegian code, to all 'particular' states of mind. It cannot be desirable to lump insanity together with a number of heterogeneous states of mind, a system of treatment which necessarily obliterates the boundaries between health and disease, between the normal and the abnormal—a system which, by its very vagueness, lends itself to abuse. For immunity is under it extended to a number of mental conditions, such as passions, which, according to modern notions, ought certainly not to excuse crime; and even were it thought advisable to exempt those acting under their influence, such states ought at all events to be made the subject of special provision. The defects of this method are lucidly explained by Gretener. "Such a plan," says the learned professor, "would drag the expert into

fields foreign to him, would invite him to indulge in metaphysical deductions, and give him an excessive and objectionable latitude. The judge would be left without any direction as to the cases in which expert evidence ought to be called, and in which the question of responsibility or irresponsibility ought to be submitted to the jury. And finally the medical expert would be called upon to give, instead of his scientific opinion, merely evidence as to facts purely empirical concerning the state of the psychical faculties of the actor."

Having ascertained that the best legislative method of dealing with our problem is that which prescribes a psychological criterion to be applied in cases of lunacy, we must now proceed to examine in detail the more important tests of this class met with in different systems of law. This task will engage our attention in the next chapters.

CHAPTER VIII.

THE KNOWLEDGE TEST.

"Forgive them; for they know not what they do."—St. Luke xxiii. 34.

If we examine the provisions of the various systems of law as to the criminal responsibility of lunatics, leaving aside those which follow the Code pénal in identifying immunity with insanity, we find that there recurs, in most of them, with a regularity almost monotonous, as a test what may be called in Virgilian phraseology the "mens sibi conscia recti." In the vast majority of foreign countries it is, however, but one of the criteria, and in some its application is restricted to limited classes of mental disorder, more particularly to the congenital varieties; thus Paraguay resorts to it merely in the case of imbeciles, the canton of Aargau in those whose mental powers are insufficiently developed, that of Lucerne in the case of idiots. In England, on the other hand, knowledge of right and wrong is not only the universal test by which the responsibility of any madman, whatever the type of his disease, is to be decided, it is also the only criterion; and since, moreover, its theory has been studied much more fully here than elsewhere, it has a pre-eminent claim to be termed the English test. The formula in which this test is clothed in different legal systems varies but slightly, and may be reduced to two elements, one or both of which are met with in all codes which have adopted this criterion. The one is a knowledge of the nature, quality, significance or consequences of the act; the second is a knowledge that the act is wrong. We have already seen that in our own law it is not quite certain whether the 'wrong'

here spoken of refers to the legal or to the moral character of the act, though I most strongly favour the former interpretation. I have also stated that of the colonial codes some, as that of Canada and of New Zealand, leave the matter equally in doubt, whilst others, like the codes of India and of the Sudan, escape from this ambiguity by exempting from punishment a madman if he did not know either that his act was 'contrary to law' or that it was 'wrong,' obviously meaning 'morally wrong' by this latter term. The foreign codes, with very few exceptions, in order to excuse a lunatic, require that he should have been incompetent to discern the criminality of his act: the Swiss cantons of Fribourg and Vaud alone making liability depend on the faculty of appreciating its moral character instead.

To avoid confusion, let us first inquire what is the meaning of the knowledge test if we understand it in this sense that, to be punishable, a lunatic must be aware of the nature, quality, and of the illegal character of his act. One thing is certain: knowledge is an attribute of the intellect alone and, as the critics of the English system never tire of asserting, it has nothing whatever to do with the affective side of the mind, with the emotions, the will or the power of self-control, so that, as I have shown in a previous chapter, Sir James Stephen's attempt to read the latter faculty into the term 'knowledge' is a hopeless failure. The first difficulty which arises in the interpretation of the tripartite test is the exact import of the first two terms: wherein do the words 'nature' and 'quality,' as opposed to 'illegality,' differ from each other? Maine distinguishes the two terms in the following way: "A man is properly said to be ignorant of the *nature* of his act when he is ignorant of the properties and operation of the external agencies which he brings into play; as if, for instance, an idiot should fire a gun at a person, looking upon it as a harmless firework. He is ignorant of the *quality* of his act if he knows the result which will follow, but is incapable of appreciating the elementary principles which make up the heinous and shocking nature of that result; as if, for instance, an idiot was

unable to perceive the difference between shooting a man and shooting an ape." I cannot say that this explanation of the difference between the two expressions appears to me either clear or satisfactory. Nor does the study of the clauses of foreign codes throw much light upon the subject: none of them contains a reduplication of terms so absolutely synonymous in common parlance; they either content themselves with speaking of the nature of the act alone, or, if they add a second term, it is 'consequences' which, of course, embraces much more than 'quality.' The closest approach to English phraseology is found in the provisions of the Penal Code of Russia, which speaks of the nature and significance of the act, and the revised "Motives" explain that 'nature' signifies the physical character, 'significance' the social and legal character of the act. What renders it difficult to put a similar construction upon the corresponding expressions in the English rule is that the Russian code stops short here and does not, like the rule of the English law, go on to speak of the wrongfulness of the act, for which there can, of course, be no room where the interpretation of the word 'significance' is so broad as to include illegality. Yet I do not think that either of the words 'nature' and 'quality,' as contained in the answers of the English judges, ought to be rejected as mere surplusage. For on analysing the minimum of knowledge which a man must possess in order that it may be properly said of him that he knows what he is doing and that that which he does is a crime, we shall find that corresponding with the triad: 'nature,' 'quality,' 'criminality,' there are three aspects in which that knowledge presents itself:

(1) He must be aware of the identity of the actor, of the true nature of the material objects upon which he acts, of the operation of the physical agencies which he sets in motion, and of so much of the existing facts as are ingredients of the *corpus delicti*.

(*a*) He must be conscious of his own identity as that of the actor. This is one of the essential elements of knowledge which is too frequently overlooked. Mental disease may work such havoc in the mind as to destroy all those elementary

notions which make up self, The *débâcle* may be so complete as to divest the patient of the knowledge of the existence of himself as a thinking being, and the negative counterpart of Descartes' famous "Cogito, ergo sum" is in him realised. Such a creature has lost all claim to be reckoned among the species *homo sapiens*, and is, in the very nature of things, no more capable of committing a crime than 'a brute or wild beast.' Complete loss of self-consciousness is met with in idiocy and in the highest degree of dementia; but the mental identity likewise disappears where the patient, as a result of delusion, has undergone a radical transformation and believes himself changed into some other object belonging to the inanimate or animate world or into some other human being. I think it ought not to make the least difference, so far as the question of responsibility is concerned, whether the accused fancies himself to be a door-handle, an onion, or the Great Khan. To apply to such a madman the English rule as to partial delusions and to treat him as if the subject of his delusion were true is a plan bound to lead to the grossest absurdities and to place the judge in the most embarrassing situations; guided by this principle, he would indeed have to acquit the log of wood, the dog, and, unless he is anxious to anticipate the functions of his colleague Minos, the corpse too. But how will he deal with the prisoner who claims to be the Saviour himself? Shall he rely on Justinian's definition of jurisprudence as being the knowledge of things divine and human and, fortified by such juxtaposition, a second Pontius Pilate, deliver up the deity to the hangman? I hold that any metamorphosis, whatever its direction and whatever its shape, and whether it assumes a form so vivid as to emulate the Ovidian prototypes or so indefinite and shadowy as in the case of a lunatic in my own experience who merely asserted that he was not himself, but "the other man," ought without more to excuse any crime. For a knowledge of the nature and quality of the act presupposes above all other things a knowledge of the identity of the actor, and I cannot see how any knowledge of any kind can be attributed to him who has

so far deviated from the divine image that he no longer applies to himself the words of the Almighty, "I am that I am," in whom, the legal persona remaining the same, the psychological individuality has undergone a complete revolution.

(*b*) He must be aware of the true nature of the material objects upon which he acts. A lunatic who batters another man's skull under an insane delusion that he is breaking a jar is the classical example of a want of such knowledge.

(*c*) He must understand the operation of the physical agencies which he sets in motion. Up to what point he must be able to follow or rather to anticipate their working in order to be held responsible, must indeed depend upon the exact words of the law. Where a knowledge of the consequences of the act is made essential to guilt, insane ignorance of the consequences, whether proximate or remote, will, of course, excuse. But even where the law speaks merely of the nature of the act, he must be able to understand at least its immediate effects, so much of the consequences at any rate, as are comprised in the term result. I cannot better illustrate the kind of knowledge falling under this head than by citing the case which has been made famous by Sir James Stephen, and which is constantly quoted after him by medico-legal writers either with the object of proving the insufficiency of the English knowledge test or in order to support some artificial and strained interpretation of the word 'know.' A man sees another by the wayside and cuts off his head in order to enjoy the astonishment of the victim when he shall awake. The very aim of the lunatic, his expectation that the murdered man will get up and look for his head, proves that the accused is not capable of foreseeing the proximate effect of the operation of the forces which he sets in motion, the immediate result of the work of his hands—in short, all that is of legal importance in the act itself. In my opinion it is quite irrelevant whether he was aware that that which he did was a piece of mischief which he ought not to do and that in this sense it was wrong. I also think it very far-fetched, to put it mildly, if it

is sought to excuse him on the ground that though he knew his act to be wrong, he did not know how wrong it was. His claim to immunity is founded on his ignorance, not of the wrongfulness of the act, but of its very nature. For put on the latter term as narrow a construction as you like, I claim our madman is entitled to its protection.

(*d*) He must know so much of the existing facts as are ingredients in the *corpus delicti*. The general paralytic who has forgotten that he is married, and in the bliss of such ignorance goes through a ceremony of marriage with another woman whilst his wife is alive, is an instance of one deficient in such knowledge.

(2) He must have such knowledge of the abstract principles of law as to appreciate that certain classes of acts are threatened with criminal sanctions; or rather, since an actual knowledge of the law is not required in the healthy, disease must not have destroyed in him that for which the German jurists use the very expressive term 'Rechtsbewusstsein' (legal consciousness), which enables the normal members of political society to surmise or divine the provisions of the penal code.

(3) He must be competent to subsume a concrete act under its proper legal category; he cannot otherwise be said to understand the legal character, the legal significance or import of his deed. It is not indeed required that he should be capable of drawing nice technical distinctions such as may prove puzzling even to the trained lawyer. It is not, on the other hand, enough if he has some vague notion that his action brings him into conflict with some clause or other of the penal code. He must have such intelligence left as enables him roughly to appreciate what sort of a crime he is committing and in a popular way to classify his act according to its gravity. To explain my meaning, I borrow from Dr. Guy's work the case of 'daft Jock Barclay,' executed at Glasgow on May 14, 1833, for the murder of Samuel Neilson. Prisoner was an imbecile who killed his friend that he might possess himself of three one-pound notes and a watch. After the

murder, Barclay, while going to spend part of the money with the first person he met, dropped first one and then another of the notes at his feet. When questioned, he could see no difference between killing a man and killing an ox, except that "he would never hear him fiddle again"; and he looked on the watch as an animal and, when it stopped, thought it had died of cold from the glass being broken. At the trial much stress was laid on the prisoner's knowing right from wrong; but, it is rightly asked, how extensive and accurate must have been the notions on this point of one who thought a watch a living creature and could see no difference between killing an ox and killing a man. Barclay, as the evidence showed, knew that the act was one he ought not to have done. He possibly knew also that he would be punished for it. But to one to whose imbecile brain a watch, an ox, a man alike were animate creatures, nothing more and nothing less, a murder must, at the most, have appeared a malicious injury to property, and it certainly seems *summum jus* and therefore *summa injuria* to hold that this mental wreck was aware of the legal character of his act.

Such is, I think, the minimum of understanding which a madman must possess in order to be convicted of crime under an application of the knowledge test. That knowledge naturally and logically resolves itself into the three factors which we have just discussed, and though I should hesitate to assert that it was these which the judges intended to symbolise by the three words, nature, quality, wrongfulness, I submit them as a reasonable interpretation of these terms. In any case, nothing less will suffice to enable us to say that a man is aware of the nature, quality and criminality of his act. Some authorities are more exacting and claim that, to satisfy this test, a madman must have the faculty of thinking about the intended act in the same way as a sane man would think about it, that he must be capable of passing a rational all-round judgment on the deed he is about to do, together with all its consequences, "necessary, probable or merely possible,"

that he must be able exactly and correctly to appreciate all the relations in which he stands to the social aggregate. In my idea, these extravagant pretensions cannot be maintained without unduly straining language and without running counter to those elementary principles of jurisprudence upon which criminal responsibility and the exceptions therefrom depend.

I have before expressed the opinion that the judges cannot be accused of undue verbosity for choosing three words in which to express the knowledge test. On the other hand, I grant that those codes which are content with two or even merely one term may be reasonably interpreted to convey exactly the same meaning and to include as much as our analysis has shown necessary to include. We have seen that in Russian law only the words 'nature and significance' occur; yet the "Revised Motives" show that they mean the capacity of the actor to "understand the quality of the act, its relation to the external world and to the rights of third parties, to appreciate the position and negative commands of the law," a construction quite as wide, if not a good deal wider, than that which we have put upon the knowledge test. So if the Criminal Code of the Gold Coast speaks of the nature or consequences of the act and is silent about its wrongfulness, it obviously refers to the legal quite as much as to the physical nature and consequences. And if Italy excuses a madman whom disease deprives of the consciousness of his acts, the courts have always held this expression to signify a knowledge of its character both as a matter of fact ('coscienza dell' agire') and as a matter of law ('coscienza del diritto'). Conversely, a good many codes make responsibility depend upon the prisoner's capacity to understand the criminality, illegality or wrongfulness of the deed, never mentioning its nature, quality, significance or consequences. Yet, I think, their language is comprehensive enough; for a person who does not know what he is doing cannot possibly know that that which he is doing is a crime; and in this respect,

I regard as specially significant the wording of the code of South Dakota, which is clearly meant to express the test laid down by the English judges in MacNaghten's case, but does so by exempting from punishment, in somewhat laconic terms, those "who were incapable of knowing the wrongfulness of the act."

We have, hitherto, taken notice only of the knowledge of the illegality or criminality of the act, entirely disregarding the faculty of appreciating its moral character. But since Stephen and after him the majority of the English medico-legal writers have interpreted the word 'wrong' in the MacNaghten rules as meaning 'morally wrong,' since moreover some few codes make the capacity to understand the moral nature of the act the test of liability, we must now proceed to inquire which of the two kinds of knowledge ought, on general principles, to decide the fate of a lunatic charged with crime. The only argument that can be reasonably advanced in favour of the claim that it is the knowledge of the moral quality of the act which ought to determine its punishability, is the fact that its adoption would secure immunity to some few lunatics who were well aware that the deed which they were about to commit was an offence against the law of the land, but whose case is yet so anomalous that everybody feels they ought to be excused. Hadfield is a good illustration in point; the father who kills his child under the insane belief that it is the only way of saving it from the more painful death by starvation or the only means of ensuring it eternal bliss, is another. As against this it may be said that the cure is not a radical one; for if one class of exceptional cases is thus disposed of, plenty of others remain. Furthermore, it is a bad legislative principle so to fashion our rules as to make them fit in with exceptional cases; if, by making the moral consciousness of the act the criterion of criminal responsibility, we exempt from guilt a few madmen who ought not to be convicted, a greater number of crimes will go unpunished which undoubtedly are deserving of punishment. The recognition of a knowledge of the moral

character of the act as the criterion of responsibility has been recommended on the following ground:—"The circle of moral duties is much wider than that of legal ones, so that the interpretation here put upon right and wrong leaves an offender no ground of complaint if, after having (at his peril) done that which he knows to be morally wrong, he finds (to his cost) that his act also falls within the narrower circle of legal duties, and is punishable by human law; for when he committed the act in question, he admittedly was conscious that it was contrary to the moral law." (Pitt-Lewis, Smith, and Hawke.) The weak point in this argument is that it overlooks the fact that if the circle of moral duties is much wider than that of legal ones, the two circles are not concentric either; that though there is a large field of vice upon which the law would never dream of encroaching, there are, on the other hand, many acts which are judged to be laudable, to be worthy of neither praise nor blame, or at least to be excusable before the high court of human conscience, but which the law of the land does not hesitate to brand as crimes. "I can conceive a person whom the Deity might not deem accountable, but who might be perfectly accountable to human laws," said Lord Brougham in the House of Lords ("Hansard's Parl.," vol. lxvii., 728); that the desire to shield such person, if he happens to be a madman, from the penal consequences of his act is the very *raison d'être* for that test of responsibility which is founded upon the moral consciousness of the accused, is the important point which Pitt-Lewis seems to have forgotten. If we proceed to inquire wherein consists the difference in the measure by which the ethical tribunal and by which the English law determine guilt, we shall find that it consists essentially in that the former takes into account, whilst the latter affects an utter disregard for, the motives which prompted the actor. In this neglect of motive our own law goes farther than foreign systems, and it is, therefore, much more difficult here than elsewhere to gauge the criminality of the act by the moral wrong involved in it. I do not deny that abroad a court of law might yet be found

which would acquit a father who had treated the world to a revival of the tragedy of Virginia; but the stern legality of this country would treat with scant respect such *délit passionné*. "Whom ought the law to punish?" asks Baron Bramwell (*Nineteenth Century*, December, 1885), and he replies: "The answer is easy: all that it threatens, on conviction. But then comes the question: whom ought the law to threaten? The answer is also easy: all who would be influenced by the threat, all whom it would, or might, deter or help to deter. The question, therefore, in any case would be . . . whether the person accused understood the law's threat. If he did not, it would be wrong to punish him, because it would be useless to threaten him." I think these few sentences are a splendid summary of the legal theory of criminal responsibility and of the grounds of exemption therefrom; capacity to understand the law's threat is an excellent formula which concentrates it in a nutshell. The law has no concern with the view a moralist might take of a given act; it need not consider whether the would-be actor was conscious of the moral sanctions which he was liable to incur; all that is required is that, at the time of doing the act, he was aware that, by doing it, he would bring down upon himself the strong arm of the law; and *de lege ferenda*, a knowledge of the criminality of the act, not of its ethical value, should certainly be the factor to turn the scale.

One would have thought that a criterion which flows so naturally from the elementary principles of jurisprudence, which, moreover, is found in practically every single system which lays down a psychological test of responsibility at all, must be useful and reliable, at any rate so far as it goes. And since the knowledge test is in special harmony with the foundations of English criminal law, it must appear strange that it is almost only in this country that it has met with much adverse criticism. It is true that on close scrutiny the vast majority of the writers who, in terms, deny the value of the knowledge test, will be found to mean merely that it ought

not to be the only criterion. And the few objections really raised against its intrinsic merit spring from misunderstandings as to its true significance. These may, almost without exception, be traced to two fundamental errors: the one is frequently committed by medical writers who take it for granted that insanity confers immunity from punishment, and when they learn that the law makes the capacity to distinguish right from wrong the test of *responsibility*, jump to the conclusion that the law regards the want of such knowledge as the criterion of *insanity*. The other error is shared by members of the medical and those of the legal profession: it is this, that the ignorance of the nature and quality of the act must, in order to excuse, spring from delusion. The knowledge test is frequently misrepresented in this country to mean that, in order to establish the plea of insanity, the defence must, to the satisfaction of judge and jury, demonstrate the existence of specific delusions and trace a direct connection between them and the act charged as criminal by proving that the prisoner, by reason of such delusions, saw his act in a false light. This is a heresy exclusively English, and the objections founded thereon do not in the least touch the value of the knowledge test. I have already shown that delusions are not in our law essential to the defence of insanity, and if Dr. Mercier quite justly remarks: "It is in this way chiefly that insanity exerts its influence in causing injurious and criminal acts: by the obscuration of the true value and relation of facts rather than by the influence of definite delusions," I can only say that the English rule as it stands is wide and comprehensive enough to do full justice in all cases where the intellect is clouded by insanity, whether the excusable ignorance or error results from delusion, from "the obscuration of the true value and relation of facts," from defect of memory or from any other morbid cause whatsoever. The knowledge test is, however, also attacked on another and broader ground which, if made out, would not, it is true, be fatal to it, but somewhat detract from its practical usefulness. Let us take Dr. Blandford as the spokesman of those who

object to the knowledge test on this ground. "In crown cases," he says, "you are asked if the prisoner knew what he was doing when he committed the crime, or if he knew right from wrong, which are questions which cannot be decided by medical science." If what this experienced alienist means to convey is that cases do occur in which medical science in its present state is incompetent to answer the questions which the court in criminal lunacy usually puts to the expert, he is no doubt quite correct; in such a case it would be the duty of the medical witness honestly to explain the limits of his science, and the tribunal could then but proceed in the same way as it does in innumerable other instances in which the evidence is inconclusive. If Dr. Blandford means that the expert is frequently at a loss for an answer when called upon to decide what connection, if any, exists between a given delusion and a given act, I can only repeat that in order to establish the plea of insanity, it is not necessary to prove such connection; besides, the medical witness is called as an expert and is, as such, entitled not merely to prove facts, but to give to the court the benefit of his opinion, and such opinion is entitled to respect even where the only reason for his declaring a prisoner not to possess that knowledge which the law makes a condition of criminal responsibility is that a somewhat large experience has taught him that lunatics suffering from the same malady and exhibiting the same symptoms as the prisoner do not, in general, possess that amount of intelligence which would enable them to appreciate the nature, quality and wrongfulness of their acts. If, however, Dr. Blandford wishes the broad statement which he makes to be taken as literally true, I can only say that he is contradicted by everyday experience. Medical men constantly come forward and in their character as experts do answer the very questions which the distinguished writer claims cannot be answered by medical science. At any rate, among all the psychological criteria which have ever been inserted in a code or suggested by writers, philosophical, legal or medical, the knowledge test deals with facts more knowable

than any other; for it must be conceded that it is easier to reproduce another man's thoughts, sane or insane, than his feelings, his emotions, his impulses, his desires, or the dictates of his will.

Much more difficult to answer is the objection that the knowledge test, standing by itself, is insufficient to do complete justice in all cases, and that it ought to be supplemented by a second criterion which takes notice of the affective side of the mind. "The legal test of insanity is simply a test of knowledge. It formulates the popular but erroneous idea of mind which makes it the equivalent of the intelligence, and which either ignores the emotions and the will, or accepting the poetical psychology of Scripture, regards them as functions of the heart, the bowels and the reins." Thus Dr. Cullingworth. And the well-known German criminalist, Hugo Meyer, expresses the same idea in a more prosaic form where he says: "If we wish accurately to define the conditions of criminal responsibility, we must not be content with exacting a certain amount of understanding, thus laying the whole stress upon the intellectual aspect of the mind; nor can it be considered as satisfactory if merely a certain degree of freedom of will is required in order to establish responsibility. It is only in a combination of these two postulates that an adequate solution of the problem will be found." The claims thus advanced cannot be completely thrashed out till those tests which are founded on the manifestations of the emotional life and the will have been examined in detail. The investigation of these criteria will claim our attention in the next few chapters. Here I shall content myself with remarking that even among those authorities who most strenuously insist upon the doctrine that freedom of will is the true foundation of all guilt, many uphold that an exclusive knowledge test is the only satisfactory and reliable mode of dealing with the criminal responsibility of lunatics. "Consciousness of legal duty" is the formula in which Koestlin, Berner and Haelschner wish to see it clothed, whilst to Binding the expression "knowledge of the illegality of the act" proves

more attractive. "Guilt," says Janka, "presupposes the presence and adequate development of the intellectual element involved in the act." Traeger gives it as his opinion that "responsible is he who, at the time of doing the act, was capable of understanding the legal significance of his act." But what is most interesting is that the great Carrara has, on speculative grounds, evolved a theory of criminal responsibility of lunatics which comes very near, if it does not actually reproduce, the actual provisions of the English law, with their merits and demerits. He thus sums up his teaching: "Insanity considered as a fact negativing imputability may be defined as a morbid state which, by depriving man of the faculty of knowing the character of his acts in their legal aspects, carries him away to violate the law without his being aware that he violates it. From this definition flow the following propositions:

"(1) That only intellectual insanity (*mania cum delirio*) can negative responsibility;

"(2) That intellectual insanity always excludes responsibility when it is total. (This is the total insanity of Mr. Justice Tracey, where the patient is on the mental level of a brute or wild beast). If partial, it excludes it only when it is operative, *i.e.* if it influenced the intention to do the act;

"(3) That the greater or shorter duration of the morbid process can have no effect whatever on the question of responsibility, provided always that the attack coincided with the criminal act. Hence even temporary insanity may be effective in excluding liability for the act."

CHAPTER IX.

FREEDOM OF WILL.

"Actio recta non erit, nisi recta fuerit voluntas; ab hac enim est actio. Rursus voluntas non erit recta, nisi habitus animi rectus fuerit; ab hoc enim est voluntas."—Seneca, Epistolae, 95.

"Lo maggior don, che Dio per sua larghezza
Fêsse creando, ed alla sua bontate
Più conformato, e quel ch' ei più apprezza,
Fu della volontà la libertate,
Di che le creature intelligenti,
E tutte e sole, furo e son dotate."

Dante, "Paradiso," v. 19 *seq.*

Amongst the systems of law which make freedom of will the sole test of criminal responsibility in cases of lunacy, the German Penal Code occupies the foremost place. In choosing a criterion which involves the most abstruse problems concerning the human soul, the Teutonic genius has but proved faithful to itself: no other eye could look into the metaphysical abyss without turning dizzy. Furthermore, there is no doubt that the German legislator, in selecting the will for the force which is to turn the scales of justice, has been powerfully influenced by the teachings of that master-mind of the nineteenth century who advanced as the fundamental doctrine of his system the proposition that the only reality in the universe is will.

If we cannot wonder that the German model has been faithfully copied by countries which are German in everything but political subjection, or by such as habitually follow the intellectual lead of the Fatherland, great must be our surprise if we find that the system has found many admirers among a nation of so practical a turn of mind as the English race, and that its converts are here recruited not so much from the ranks of speculators and theorists as from among members of the

medical profession. Luff tells us that "the majority of writers on forensic medicine agree that the real criterion of responsibility is the freedom of will, and the true test of irresponsibility is whether the individual has lost the power to control his actions"; he quotes *inter alia* the testimony of Ray that "liberty of will and action is absolutely essential to criminal responsibility, unless the constraint upon either is the natural and well-known result of immoral or illegal conduct." Taylor expresses the same idea if he says: "The true test of irresponsibility in all doubtful cases appears to be whether the person at the time of the commission of the crime had or had not a sufficient power of control to govern his actions; or, in other words, whether, knowing the act to be wrong, he could not avoid the perpetration of it. This involves the consideration, not only whether insanity existed in the accused, but whether it had reached a degree to destroy, not a consciousness of the act, but volition—the will to do or not to do it." I may here point out, in passing, that with both Luff and Taylor and, in fact, in medico-legal literature generally, freedom of will and power of self-control are interchangeable terms. It is in this sense that Cullingworth employs the latter expression, where he informs us that "the existing tests which are mere knowledge tests should be entirely abolished, the question of responsibility depending not upon a person's knowledge, but upon his capacity for acting upon that knowledge; that is, upon his power of self-control." So Blandford: "Our test is not a knowledge of the nature or quality of an act, but the capacity or incapacity of abstaining from it." Our test of what? Of sanity or of responsibility? With the majority of medical writers it seems not to matter which: whilst the authorities first quoted maintain that freedom of will is the real test and ought to be the legal test of imputability, other writers of equally high standing are quite as emphatic in laying down that it is the real test of insanity. Marc goes so far as to define insanity as the destruction of the faculty of volition by disease, and Guy follows closely on his track when he opines: "Give what definition or

description of madness you please, you cannot exclude from it the weakening or destruction of the will." An innate inability to distinguish between insanity and irresponsibility accounts for that striking contradiction in which many writers on forensic medicine involve themselves, without ever becoming aware of it, who insist that insanity without more ought to exempt from punishment, and in the same breath lay down that freedom of will ought to be the test. The true meaning hidden behind their laxity of language is obviously this: The legislator ought to content himself with enacting the general principle that insanity in itself is a cause of non-imputability; and the medical man to whom would naturally fall the task of pronouncing on the question 'sane or insane?' would or should then base his answer on the presence or absence of the faculty of volition. This is, as we have seen, the turn which events have taken in France, where the letter of the law identifies lunacy and irresponsibility, and medical interpretation has made the free will the criterion of both.

The peculiar fascination which the will test seems to exercise upon the medical mind on both sides of the English Channel and elsewhere appears in a very strange light if we consult the professional authorities of that country in which this criterion has been given legislative recognition. So far from finding favour, the will test is looked upon in medical Germany with nothing but the deepest distrust and is almost universally condemned. To mention but two names eminently representative of the last two generations of German medical jurisprudence, Griesinger and Mendel are in perfect accord in their advocacy of the system of the Code pénal in its textual simplicity and with the natural, literal meaning of its terms. The former during the later years of his career as an expert persistently refused to answer all questions tending to elicit whether a prisoner whom he had pronounced insane was yet capable of freely determining his will; and Mendel not only followed in Griesinger's footsteps, but made bold to assert that freedom of will is a conception of which the medical expert

can make neither head nor tail. He furthermore advises his colleagues, if pressed by the court, in spite of their scruples, to deliver an opinion on a matter which he regards as lying entirely outside the compass of medical science, to consider it as an axiom of psychiatrics that the existence of a free will, give the term whatever meaning you like, can never be conceded in the case of any lunatic, whatever the form of his illness. Indeed, the text of Paragr. 51 itself affords an easy loophole to escape from an inconvenient dilemma; it exempts from punishment an actor who, at the time of doing the act, was in a state of morbid disturbance of the mental faculties—note: 'morbid disturbance of the mental faculties,' not 'insanity,'—which excluded the free determination of his will. Now the term 'morbid disturbance of the mental faculties' is construed as having a wider meaning than the term 'mental disease,' and is understood to cover not merely insanity, but also neuroses of various kinds in so far as they have a tendency to affect the mind, the large family of what the French call *demi-fous*, the degenerate, those suffering from hallucinations only, in short, all the borderland cases. And at any rate the preponderance of legal authority supports the medical claim that the legislator's intention was that the two categories should be measured with a different measure. True mental disease is deemed to negative responsibility *per se*, and without need for any further proof that the freedom of will is thereby destroyed; there is here no room for the application of the psychological test. The latter is reserved for cases of the second type, viz. doubtful and borderland cases. Nor can it be denied that the manner in which the paragraph originated, and its fate during its passage through the Reichstag lend colour to this interpretation. (Cp. Shorthand Reports of the Reichstag, Session 1870, p. 1147 and following.) Thus we arrive at the strange result that whilst in France interpretation has introduced the will test of which the text of Art. 64 knows nothing, in Germany interpretation has, in the case of mental disease, eliminated it though the letter of Paragr. 51

prescribes it in so many words. And if the two systems of law thus approximate from both ends, they are brought into direct contact in Art. 53 of the Servian code, the first half of which closely follows the model of the French code, whilst its second half impliedly lays down the will-test.

This liberal interpretation of the German text has not, however, remained unchallenged. Some authorities, refusing to be guided by the presumable intention of the legislator, and strictly adhering to the obvious grammatical meaning of the paragraph, hold that mental disease does not, by the German code, in itself exonerate, but that it exempts from punishment only if it excludes a free determination of the will. The problem to be solved would thus be twofold:

(1) to decide what disturbances of the mental faculties are to be considered as morbid, *i.e.* as the result of disease;

(2) to establish whether and how far the free will is excluded by them.

The Oberlandesgericht of Stuttgart, in a decision of October 25, 1889, apparently subscribes to this view: "Not every form and not every degree of mental disease abolishes freedom of will and freedom of action; but it must be the subject of inquiry in each individual case whether, considering all the circumstances, a connection exists between mental derangement and the act in question." Besides, the 'motives,' *i.e.* the authoritative explanatory notes accompanying this paragraph, clearly show that the very object with which the clause "which excluded the free determination of his will" was avowedly inserted, has been to stifle all attempts at over-stretching pathological notions in the explanation of human conduct and to reduce within due bounds the influence of the medical expert, by furnishing the judge with an independent psychological criterion by which to gauge and to appreciate the professional evidence. This being so, we cannot, unfortunately, forego the unpalatable task of diving into the deep seas of metaphysics, but are compelled to enter upon a more minute examination of the problem of freedom of will.

At the very threshold of our inquiry we are confronted with a doubt the mere existence of which seems to render the will test an utterly futile and hopeless one; I mean the question: Is there such a thing as a free will? Jules Falret, indeed, says: "The unanimous consent of mankind, the innermost feeling of every one of us, all religions, all systems of philosophy and of law unite in affirming this great psychological fact which forms the basis of human action, of morals and of law, that man is free to choose between good and evil, free to decide, by means of his will, between the different motives which urge him on in various directions, and that he is, therefore, morally responsible and legally punishable if he has voluntarily done an act reprobated by morality and forbidden by law. The freedom of will, as primitive psychological fact, and the moral and legal responsibility, as the practical sanction of this principle in the individual life of man as well as in the collective functions of society, these are the great facts which govern human existence and which form the basis of morals, of law, and of all legislative systems." Beautiful words, powerful oratory! But what becomes of the 'unanimous consent of mankind' in the face of such dicta as the following: "Freedom of will is nothing but a dream of the metaphysician." (Tommasi.) "Considering the results of modern research, it is no longer permissible to speak of a free will." (Puglia.) If these views were peculiar to modern positivism, they might, indeed, be left out of the reckoning as a negligible quantity where a problem of practical legislation is under review; for its teachings are so much out of harmony with the fundaments of all established systems of law that no possible advantage could be gained by measuring their provisions by that standard. But the negation of the free will is by no means a flashlight of the Italian school. Not to quote dicta of philosophers belonging to grey antiquity, Spinoza leaves no doubt as to his opinion on the subject if he says: "All I can say to those who believe that they can speak, remain silent, in short act by virtue of the free determination of their minds, is that they dream with open

eyes." Spinoza has had many followers, and among them in modern times two men as far apart on other subjects as Jonathan Edwards and Herbert Spencer, who yet agree in thinking that men are irresistibly impelled to every act which they commit; each act being but a single link in one great chain of connection, the origin and end of which human reason has never fathomed. The will test thus lands us in the midst of that time-honoured controversy between determinism and indeterminism which still rages as hot as ever and with no more hope of an early settlement, though it must be conceded that at the present moment the determinism in a modified form holds the ground of vantage. It is true the German legislator emphatically disclaims the intention of introducing this philosophical battle into the courts of law: "The right of the state not merely to take such measures against the criminal as are required in the interests of public safety, but to punish him, rests on the conviction of mankind in general that the adult in the state of mental health possesses sufficient will-power to repress impulses which urge him on to the commission of criminal acts and to regulate his conduct in accordance with the general legal consciousness. There cannot, therefore, be anything objectionable in the legislator giving effect, in the criminal code, to this general conviction which is the foundation of criminal as well as of moral responsibility, when defining responsibility and the states excluding it. There need, in particular, be no fear that the conflicting metaphysical opinions held as to the freedom of the will shall be introduced into criminal proceedings; for it is thereby made clear that the inquiry is, in each individual case, to be limited to the investigation whether the accused is in that normal state of mental health to which popular legal conceptions attach responsibility, whilst the latter fact itself is once and for all predetermined by the law, and all discussion as to it in respect of particular cases is thus excluded. It is the duty of the judge presiding at the trial to see that the limits so drawn are not overstepped." (Appendix III. to the "Motives": Discussion of problems of

criminal law within the purview of forensic medicine.) It seems, however, that the pious intentions of the German legislator have not, in practice, been crowned with success; indeed, human nature would not be what it is if both counsel and those experts who are hostile to the will test, had not taken full advantage of the opportunities for mystification which the German Code so freely offers. At least Sommer informs us that "the method of dealing with the problem adopted in Paragr. 51 appears utterly inexpedient inasmuch as the vague and debatable notion of a free determination of the will is thereby brought into relief. The flood-gates are thrown open, letting in never-ending and for the most part useless discussions. Instead of embarking on a clear analysis of the subjective substrates of the act and on an investigation whether certain mental phenomena are to be considered as morbid, we find both sides busily engaged in advancing dogmatic propositions on freedom of will and on disease, which render it difficult for them to come to an understanding as to the legal appreciation of an act. The courts of law on such occasions frequently call to mind the platforms of ancient Greece on which problems, sometimes simple in the extreme, were yet discussed from different standpoints with as much genius as warmth. This might be tolerated as a play in which human intellects of a high order are matched against one another, were not the consequences of these discussions, carried on as they are in public, extremely serious and far-reaching; for the result is that two classes of the highly cultured, the legal and the medical professions, on whose harmonious and intelligent co-operation must depend the progress both of the science of criminal psychology and of criminal legislation, are estranged from each other and wounded in their susceptibilities." I most emphatically concur in the opinion of the German legislator that freedom of will is a fundamental postulate of all existing systems of penal law and the only possible justification for the infliction of punishment *stricto sensu*. Art. 45 of the criminal code of the Swiss canton of Aargau declares in as many words

that "a crime presupposes the free will of the actor," and Blackstone seems to do no more than express the same idea if he tells us that a wrong is the effect of a wicked will. But whether it is wise, nay, whether it is merely practicable to make that which is a necessary assumption, a practical test is quite a different matter. A simple illustration will make clear both my meaning and the nature of the difference for which I contend. One of the most fundamental dogmata of the Christian religion is the immortality of the soul; yet where would the Church be if it required of its members or merely of applicants for holy orders proof that they possessed an immortal soul?

Having disposed of this initial difficulty, we must next try to discover what is meant by that freedom of will which is to be the test of criminal responsibility in cases of lunacy. If I pass in review all the conflicting statements, all the banalities and tautologies, all the metaphysical obscurities which have been advanced as definitions of the free will, I cannot help feeling with Disraeli that 'I hate definitions.' The great Victor Cousin must have been in a similar frame of mind when he asserted that freedom of will is capable neither of definition nor of demonstration, but is something which must be felt. But as I cannot allow the fate of the poor lunatic who is accused of crime to depend on a mere state of feeling, I must be brave and swallow the bitter pill. So much is certain: whatever signification the German code may attach to the term, it cannot be that with which the Austinian analysis has rendered us familiar. A description of the will or power of willing as being nothing but a wish for or desire of those bodily movements which immediately follow our desires of them, may satisfy the physiologist, as drawing attention to the salient features of the word 'voluntary' when applied to movements; but it cannot serve as a beacon to those wandering through the dark paths of mental and moral science; it is a lifeless shadow which Schopenhauer would never have erected into the principle of the universe, nor the

German legislator into the test of responsibility. Marc's well-known definition: "The will in its normal state is a moral faculty which produces, directs, checks and modifies those bodily and moral acts which are subject to it," gives a wider scope to the term, but unfortunately it explains nothing and illuminates nothing. "Freedom of will," said Liszt, "is nothing more than normal determinability by thoughts." Replace 'thoughts' by 'motives,' and you get the standard definition of the German authorities, the sense in which the word as used in Paragr. 51 is understood by both lawyers and physicians. So Kuhlenbeck, the very title of whose interesting work betrays the source of his inspiration, says: "We negative the existence of a free will in lunatics, as in young infants and in those intoxicated, because we believe that, in any given case, they are incapable of acting otherwise than they do; because we are convinced that they do not possess the power of producing and consciously appreciating contrasting motives to counteract those which are the spring of their actions." So Mendel, who gives the most lucid account of German thought on the subject: "We content ourselves in psychiatrics with recording the fact that a struggle goes on in our minds between motives of different orders; that whenever an act suggests itself, associating ideas, *i.e.* such as urge us on to do it, strive with contrasting ideas, *i.e.* such as invite us to forbear from it. The fact of this struggle represents that which may be called a free determination of the will. What will really decide whether an act be done or not, is the greater relative strength of the associating or contrasting ideas." Will thus ceases to be a blind force and becomes what has been aptly termed a 'reasonable will,' determinable by reflection, deliberation and judgment, the faculty of being guided by rational and ethical considerations. Impallomeni echoes and well sums up the teachings of the German school if he writes: "Science conceives the will as a mere product of motives; this is the only matter of fact with which experience supplies us; everything else is transcendental and cannot be taken into account."

Hence motive becomes the pivot on which the will test turns; and though, perhaps, no criminal motive ought in strictness to be called normal, yet the meaning of the latter term, when, as here, opposed to morbid, is perfectly obvious and free from ambiguity. Now if the German law made the normal or morbid character of the motive which induces a lunatic to commit an act charged as criminal the criterion of his responsibility, not much could be said against it, but a good deal in its favour. With such a test as this a case like Hadfield's, which has never ceased to perplex and baffle the partisans of the knowledge test, would be disposed of in the twinkling of an eye: there cannot be two opinions about it, the motive which prompted him to fire a loaded horse-pistol at King George was a morbid one. Such a test would differ very little, if at all, from that recommended by writers whose views carry weight, that lunatics should be dispunishable or punishable according as to whether or not their acts are proved to be the outcome of their disease. Nor would such a test be out of harmony with the German conceptions of crime and guilt, into which motive enters as an important ingredient. Indeed, regard or disregard for motive marks the distinction between 'dolus,' which the German criminal law has borrowed from ancient Rome, and 'criminal intention,' as understood by English lawyers. And here it becomes clear at once that, all other difficulties apart, the will test, even if understood as meaning nothing more than normal or abnormal motive, could never be adopted in this country without a breach being made in one of the most elementary and fundamental notions of our penal law, a breach which no admirer of internal consistency in a legal system could welcome. But it is not the normal or abnormal character of the motives, but the normal determinability by motives, the faculty of freely choosing between motives of different orders, the power of consciously appreciating motives and counteracting them by the conscious production of counteracting motives which constitutes the German will test. And here we are once again in the midst of

metaphysical darkness. That a certain act was the outcome of a certain motive is indeed capable of proof; that such motive was not overcome by contrasting motives, of that the doing of the act is *demonstratio ad oculos;* but who would be bold enough to assert, and who bold enough to assert would be able to substantiate his claim, that such motive might not or could not have been overpowered by opposing motives? If this is the real meaning of the will test, Zuercher is right if he exclaims: "It is nothing but humbug, this judicial appreciation of the freedom of will in each particular case." For, as Saleilles pointedly remarks: "The free will in itself does not lend itself to scientific proof and demonstration; it defies all means of scientific investigation. . . . And being unable to discover it, one runs the risk of finding it nowhere, and sees in every man but an irresponsible being."

The truth is that the will is not an independent faculty at all. "A special function of the brain," says Mendel, "co-ordinate with perception, feeling, imagination, and memory, which might be called the faculty of willing, does not exist. Modern psychiatrics has, therefore, ceased to distinguish diseases of the will, such as abulia, hyperbulia, etc., of which formerly much was made, and rightly looks upon acts which seem to be the outcome of a deranged will as being the product of a morbid disturbance of the faculties of perception, reasoning, and feeling." All our acts, then, are, in the words of Kovalevski, "the product of two classes of factors: impulses and tendencies on the one hand, deductions arrived at by reasoning on the other. The will is nothing but the resultant of these two forces." And similarly Krafft-Ebing finds the elements of the free will, and therefore the conditions of the responsibility, to be two in number:

"(1) The power of discrimination (*libertas judicii*), *i.e.* the capacity of an individual to understand the nature, relations, and consequences of his acts. This involves a knowledge of the utility and necessity of political organisation, of the importance of legislation for the accomplishment of the objects of society,

of the consequences of a transgression of the laws to the individual transgressor and to the community at large.

"(2) The faculty of choosing between act and forbearance in accordance with these motives (*libertas consilii*). Whilst *libertas judicii* presupposes a certain standard of experience, intelligence, and aptitude to learn, *libertas consilii* requires an unimpeded association of ideas and a clear power of reflection, so as to be able to give regular and prompt effect to the motives supplied by the faculty of discrimination.

"Unless both of these conditions are fulfilled, the subjective substrate of a criminal act is wanting." *Libertas judicii* and *libertas consilii* are apparently but other names for a knowledge of good and evil and the faculty of choosing between them which, according to Mittermaier, constitute that freedom of will that is essential to responsibility. Perhaps the best summary of the meaning of 'free determination of will' in the German code is furnished by Stephen's dictum: "Knowledge and power are the constituent elements of all voluntary action."

Our analysis, then, leads us to the conclusion that the monism of the German Code is apparent rather than real, and that its will test resolves itself into what Mr. E. C. Clark calls "the two homely questions":

(1) Did the accused know what he was doing?

(2) Could he help it?

And in practice it differs in nothing from such criteria as are laid down in the codes of Italy, Norway, Russia, etc., and which are dualistic in form as well as in substance. Be it remembered again: the free will of the German text is a 'rational' or 'reasonable' will; and this reasonable will equals the 'reasoning powers' plus the blind 'free will' of the criminal codes of the Swiss Confederation and of several of the cantons. Our appreciation of its merits and demerits must, therefore, coincide with the judgment we pass on those systems which have adopted the double test and must depend on our answer to those two homely questions, the former of which we have investigated in the preceding chapter, whilst

the latter will form the subject of inquiry in the next. But whatever our answer may be, and whatever result we may arrive at, the wording of the German code has this grave defect that, instead of clearly formulating those two factors which are to guide the judge in deciding on the responsibility or irresponsibility of a lunatic accused of crime, it has introduced a term which lets in a sea of metaphysical darkness, forgetful of the great Feuerbach's warning: "Freedom of will! Ought this metaphysical term, which to the ordinary mind conveys no definite meaning at all, and about the import of which even the professional metaphysicians contend, to find a place in a code of laws?"

CHAPTER X.

POWER OF SELF-CONTROL.

"The good that I would I do not: but the evil which I would not, that I do. Now if I do that I would not, it is no more I that do it. . . . I see another law in my members, warring against the law of my mind, and bringing me into captivity to the law of sin which is in my members."—Romans vii. 19, 20, 23.

"Si possent' è il voler, che mi transporta;
E la ragione è morta,
Che tenea 'l freno, e contrastar nol pote."
Petrarca, Lyrics.

"THE faculty of distinguishing between right and wrong is not by itself sufficient to establish responsibility; for crime does not belong to the sphere of thought but of action. A second condition must be fulfilled before we can impute the crime to the actor: he must possess the capacity of being guided by his knowledge." Thus the 'motives' to the Russian Criminal Code Bill; and Russia has, accordingly, joined the ranks of those countries which have accepted the dual test. 'Capacity to control his acts,' 'freedom,' 'freedom of will,' 'freedom of action,' 'faculty of self-determination,' these are the terms in which the second criterion, superadded to the knowledge test, has been introduced in the different codes belonging to this group. It goes without saying that 'will' here is not the rational will of the German code which implies and includes knowledge and understanding; as opposed to the latter qualities of the human mind, it signifies a blind will denuded of both. In whatever form of language it is clothed, the second criterion means nothing more nor less than this: that the judge and jury, where insanity is alleged to exist in a prisoner, must not rest content with inquiring merely whether he was aware of

the nature and quality of the act; they must also be satisfied that he could have refrained from the act, had he chosen to do so.

In requiring an answer to both these questions, the legislatures have given practical effect to the alienists' conception of insanity as a disease affecting not only the intellect and consciousness, but also man's emotional nature and his will. It is for its disregard of the latter that medical critics persistently attack the English law: they never get tired of repeating that "the legal rule of responsibility should include not only a knowledge between good and evil, but also the power to choose the one and refrain from the other," that "a criminal is punishable, not merely because he has the faculty of distinguishing right from wrong, but because he voluntarily does the wrong, having the power to choose the right," that "a man is responsible to do that which he can, not that which he knows it right to do, and that, therefore, it should be a good defence to establish that the accused's insanity prevented him from controlling his actions and rendered him unable to refrain from doing the act although he knew it to be wrong." We have seen how Stephen, in his attempt to reconcile the letter of the existing law with the demands of the medical profession, has, by a strained and artificial interpretation of the rule in MacNaghten's case, pressed the power test into the service of the latter. Some alienist writers have even gone farther and have expressed a desire to see the knowledge test not merely supplemented, but superseded by a criterion based on self-control. Conceding that with some writers the latter term has a meaning identical with the free will of the German code and thus embraces knowledge, making due allowance for a good deal of ambiguity of language in others, and, finally, granting that many may, in the heat of the attack, have unintentionally overshot the mark, we are still confronted with a by no means inconsiderable residue of authors who bluntly and deliberately discard the English criterion altogether. When discussing the knowledge test, I have expressed my opinion that the latter, whether sufficient

in itself or not, is certainly quite satisfactory so far as it goes, and seeing that the capacity to control conduct, wherever it has received legislative recognition, figures merely as a supplementary criterion, nowhere standing by itself, I dismiss those more extreme views without further examination.

We may also disregard a limine all objections to the power test which are based on the arguments of modern positivism. From its denial of the existence of a free will follows as a necessary corollary the proposition that every crime, by whomsoever committed, is the effect of irresistible forces—a dogma which does away with criminal responsibility altogether.

Entering upon a critical analysis of the bifurcate test, we find that the postulate which forms its very foundation, is the assumption that there occur in lunacy acts which resemble the operations of the elementary forces of nature in that they break forth with irresistible violence, mere explosive discharges of the motor centres which the patient, be he a conscious spectator of the outburst or not, is absolutely helpless to prevent. The cerebral organ, it is thought, being in a state of extreme tension and the controlling influence of the inhibitory centres being for the time suspended, a mere sense-impression, a feeling, a thought suffices, in the unstable condition of the brain, immediately and with fatal necessity to set up a series of co-ordinate muscular movements which may be likened respectively to reflex phenomena or to convulsions according as to whether the stimulus was external or internal, peripheral or central, and which in their totality constitute the act charged as criminal. Or may be a conception suggesting an act by its persistency and intensity so completely dominates the mind as to exclude or overpower all antagonistic ideas that might otherwise supply counter-motives, and imperatively drives the patient to action; and though consciousness be preserved, the intellect is all the time the slave of the morbid impulse so that, instead of checking it, it is constrained to watch for opportunities and to devise means for carrying it into effect, the deed when consummated being equally incomprehensible,

and coming equally as a surprise, to the sufferer and to the observer. Whether these displays of organic energy of which man is not the author, but the victim, are to be dignified with the title 'acts,' is purely a matter of taste and definition. That they are voluntary would probably be asserted by Austin of those falling under the second of the above categories, denied of those belonging to the former; but I think it would be more in accordance with common parlance in either case to say with Blackstone that "the act goes not with the will," or with Mercier that "the volitional self does not concur in the act." Be this as it may, about that there can be no doubt: such impulses as here described are irresistible, give the latter word as strict and as narrow a meaning as you like; and no civilised being would like to see a person punished merely because his body has been moved.

One type of cases indeed exists of which the picture I have just sketched is a faithful reproduction: I mean that peculiar and interesting condition in which, for the conscious synthetical activity of the human brain, are substituted purely mechanical processes, in which ideation, the last phase of psychical evolution, disappears and its place is taken by that obscure force which we believe to be the moving principle in the lower creation and which we call instinct, so that cerebral centres, which by virtue of their complex organisation are capable of discharging the highest functions, are degraded to the performance of mechanical work. Here perceptions, sensations, impressions group themselves in an apparently arbitrary fashion, exciting such others as stand in close affinity to them, whilst more remote notions are excluded from the mental horizon, and thus originate actions, merely by virtue of blind associations, "without any participation of self," in a process of which the subject himself remains unaware, and of which he cannot, therefore, have any subsequent recollection. "The act, then, has the character of pure reflex phenomenon which occurs with unavoidable fatality, without any concurrence of the will; it is a true convulsion, differing from the ordinary convulsion

only in that the movements of which it consists are associated and adapted to a determinate end." (Foville.) It is foreign to our subject to inquire whether the automatic state of mind is peculiar to epilepsy, as is claimed by some authorities, or whether, as others assert, it is also met with in connection with hysteria, alcoholism, and traumatism. Nor does it matter much for our purposes whether it is more correct to describe the automaton as unconscious or sub-conscious. But what does matter, is that the stimulus which is instantaneously transformed into action, never crosses the threshold of the intellect: the act is automatic, reflex, convulsive, call it what you like; it is neither voluntary or intended. One of the necessary ingredients of guilt, viz. criminal intention, is wanting, and there cannot, therefore, be here any question of responsibility. And though it would be quite sufficient to base the non-imputability of the mental automaton on this general ground, yet I am willing to descend from the abstract to the concrete; and whilst fully granting that the act is, in these cases, the outcome of an irresistible impulse, I say the impulse is irresistible because the subject does not know what he is doing, and has not, therefore, the opportunity of checking it by notions of a different order, the latter being in their turn excluded from the field of consciousness. We see, then, that the knowledge test is amply sufficient to cover these conditions, and there is here no room for a further investigation whether the prisoner could help doing the act.

Similar conditions apply to that state, closely akin to epileptic automatism, the *furor epilepticus* which has been most graphically described by Maudsley, where the patient is seen striking and injuring whatsoever and whomsoever he meets, storming through the ward of an asylum with convulsive energy, like some destructive tempest, without notion or consciousness of what he is doing, attacking friend and foe indifferently, and yet having some method in his madness; "the real objects," says our author, "present themselves to him in the strangest and most unreal character; lifeless objects

threaten his life, and the pitying face of a friend becomes the menacing face of the devil." True, the raving maniac does not possess the faculty of controlling his conduct; but does he know the nature and quality of his act? Emphatically not. Power of self-control has never been introduced as a test to provide for such cases, nor for any madmen who would escape under the rules in MacNaghten's case. To get at the true meaning of the power test, we must dismiss from our minds all cases that are met by a criterion which takes the intellect alone into consideration; and amongst them, I claim, those where an act which strikes the observer as the product of an uncontrollable impulse, is in truth but the outcome of a hidden delusion. For such an act the actor will be punished if we pin our faith on the pure knowledge test; but he will be punished because the insufficiency of mental science disabled the medical expert from bringing to light that which was concealed in the prisoner's mind. An ungovernable impulse was, in fact, never at work; and to accord to him the benefit of the latter defence would be to give judicial effect to a medical fallacy.

The supplementary test has been invented to protect those lunatics who can with justice apply to themselves the words of the poet:

> "Video meliora proboque,
> Deteriora sequor,"

who, whilst knowing what they are doing, knowing that it is both morally wrong and legally punishable, are yet, it is alleged, constrained by their diseased brains to do acts which they themselves abhor. "The knowledge," it is often maintained, "may be as accurate in the insane as in the sane; the desire to do the right and avoid the wrong may be as keen in the one as in the other, but the power to resist is absent in the one and present in the other." We are, therefore, led to inquire whether insanity, while leaving the intellect intact so far at least that the faculty of discriminating between that which is allowed and that which is forbidden by law is fully preserved,

may yet give rise to impulses which deserve to be called irresistible. Meaning by an impulse a motive or desire both strong and sudden which urges us on to a prompt realisation of the act which it suggests, I need not fear being contradicted if I say that we all who flatter ourselves to be of sound mind and discretion, have felt impulses, that we could not help feeling them, and that we have, most of us, at times been led away by them, to do acts which, on more mature reflection, we would have left undone and which we have afterwards deeply regretted. We know that some persons are specially prone to yield to their impulses: we call them impulsive natures, and so far from looking upon them as mad, we have learned by experience that amongst those gifted with a peculiarly impulsive temperament may be found some of the noblest and some of the basest creatures which have been fashioned in nature's forge. I am quite willing, too, to subscribe to the doctrine that the insane, whatever the form of their illness, are more likely than sane people to give way to impulse, that "all insanity is," as Dr. Blandford asserts it to be, "impulsive, and that all insane patients are liable to commit impulsive acts." In fact, did I not aspire to that immortality which by Mr. C. L. Dana's prophecy awaits the man who first declines to define insanity, I would feel tempted to concoct a definition of mental disease in which the weakening or destruction of the inhibitory functions of the brain would be the central fact. But from all this it does not follow that the impulses of the insane are irresistible. If an impulse can be resisted, it makes no difference whether it owes its origin to disease or not, the object of the law being to make people control their evil impulses, whether sane or insane. That some punishment ought to be awarded to lunatics for acting upon impulses which they could well have held in check will be conceded by all but those extremists whom nothing but the sweeping provisions of the French code will satisfy. In attempting to answer the question whether irresistible impulses do occur in the insane, we shall see that much must depend on the meaning which we attach to the word 'irresistible.' First of

all, we must never lose sight of that distinction which, as Sir James Stephen points out, many people, and in particular many medical men, can never be got to see, the difference between an impulse which one cannot help feeling and an impulse which one cannot help acting upon. If lunatics are unable to prevent insane impulses arising in their mind, they are as regards them in a similar predicament to that in which those mentally healthy find themselves in respect of their sane impulses; and it makes no difference that the former sometimes have their root in 'imperative ideas' of which much has been made in the explanation, and in the assertion of the existence, of uncontrollable impulses. The term 'obsession,' which has been introduced as a substitute for the older phrase 'imperative idea, conception or notion,' may be defined as denoting "unwelcome thoughts obtruding themselves in spite of the antagonism of the will, predominating imperatively so that, however much the will tries to divert thought in another direction, it fails." The occurrence of such obsessions is a well-established fact of medical science, and their character is thus illustrated by Maudsley: "The insane neurosis displays its morbid energy in a convulsive idea, not otherwise than as the epileptic neurosis, to which it is closely allied, displays its morbid energy in convulsive movement. Looking at the state of such patients from a strictly pathological point of view it is entirely consistent with experience; for as the function of the motor centres is movement, so, in a like manner, a morbid state of the mind centres occasions what, for want of a more appropriate term, may be called convulsion of idea. And as the will cannot restrain a convulsive movement, of which the patient may all the while be conscious, so the will cannot always restrain, however much it may strive to do so, a morbid idea which has reached a convulsive activity, although there may be all the while a clear consciousness of its morbid nature." I quite agree that morbid ideas may force themselves into the mind of a lunatic, and that he is powerless to get rid of them, however hard he may try; but I cannot pay allegiance to the dicta of those medical writers

who represent the impulsive act as the necessary and unavoidable result of the imperative idea, who with Krafft-Ebing describe imperative ideas as "ideas fixing themselves in the conscious mind with morbid intensity and permanency, and which, though recognised as perverse and punishable (*sic!*), yet finally by their violence and painful persistence enforce their realisation in action." A better illustration of the confusion of idea and act than the application of the epithet 'punishable' to the former could not well be found. Nor can we follow Filippi in the practical conclusion which he draws from the existence of an imperative concept: "If in an individual affected with mental disease the existence of an imperative idea can be clearly demonstrated, . . . it must be admitted that he is not criminally responsible; for the freedom of choice between act and forbearance is abolished, where an impulsive force which nothing can overcome, dominates." And if MacPherson ("Mental Affections," p. 148) defines obsessions as "a dissociated group of ideas which suddenly enters consciousness, disturbing the ordinary course of ideation, but not involving the personality of the individual . . . and is to ordinary thought what impulse is to normal action," and if Glaister tells us that impulses are the ending of obsessions as the act is of thought, then my reply to both of these authorities is this, that the presence of an imperative idea no more proves that the impulse to do the act which it suggests is irresistible than the occurrence of a normal thought in a healthy mind permits us to conclude that it will be followed by action. It is most surprising, indeed, that medical authors whilst laying so much emphasis on the difference between ideation and conduct, between intellect and self-control, when they criticise the answers of the judges in MacNaghten's case, should here so completely overlook the wide gulf which separates thought from action, a gulf which is not bridged over by adding the adjective 'uncontrollable' to both the latter nouns. Feelings and thoughts may then present themselves to the mind with irresistible force; the necessity of their realisation in action does not follow as a logical corollary. And Alighieri

may yet be right if he makes the mouthpiece of his philosophy say:

> "Pognam che di necessitate
> Surga ogni amor, che dentro a voi s'accende;
> Di ritenerlo è in voi la potestate."

A confusion of thought similar to that which underlies the fallacy which I have just exposed, has most probably been the source from which the very conception of an irresistible impulse arose in psychiatrics. Those familiar with the literature of the subject know that German alienists were the first to draw attention to the existence of 'Zwangsvorstellungen' (imperative ideas), and how, by a false analogy founded upon the train of thought of which I have given specimens, they were led to invent 'Zwangshandlungen' (imperative acts) as a fit consort to the former. And, finally, it is a significant fact that the term obsession, which was introduced not so long ago as synonymous with imperative idea, has already been so far deflected from its original meaning as to be applied indiscriminately to it and to irresistible impulse.

In the next place, we must remember that a fundamental difference exists between an irresistible impulse and an impulse which is not resisted. In one sense it is true of all impulses, sane or insane, which have resulted in action, that they were uncontrollable; no doubt, they were in the then state of the actor's mind too powerful for the countervailing considerations; had it been otherwise, they would have been overcome and the act would never have been done. But if an impulse, irresistible merely in this sense, is to be a ground of non-imputability, a similar argument would excuse all acts whatsoever, even such as can in no way be called impulsive; the temptation was irresistible, *i.e.* too strong to be overpowered by motives which suggest forbearance, and foremost among them by the fear of punishment. What, it is thought, is the use of punishing a man upon whose mind the threat of the law does not operate? That the sanction must have been inoperative is sufficiently proved by its having been disregarded. But, then, the sanction would

be inoperative and useless whenever a crime has been committed. An ingenious writer in the *Spectator* (January 31, 1872) has perceived this difficulty and tried to escape from it by holding that "the justification of punishment is not to be found in its effects upon those whom it does not deter, but on those whom it does." This answer must strike as an unsatisfactory sophism all those who do not hold that the deterring effect which it has upon others is the first and only object with which punishment is inflicted. The true key to the solution of the difficulty must be found, it appears to me, in the meaning of the word 'operative.' Austin, indeed, tells us that "the sanction operates upon the obliged by counteracting the motives or desires prompting to a breach of duty," and thus lends colour to that narrow construction of the word 'operative' which lies at the bottom of our dilemma; yet he is fully aware that "every sanction operates upon the desires of the obliged, even though he violate the duty." The fact that A has been knocked down by B, does not permit us to infer that he has been inactive; he may have been engaged in an honest fight with B, and may have made a manful stand till at last he was overcome by B's superior strength. For a sanction to perform its function, to do its work, to be operative, it is not necessary that it should counteract the motives and desires which prompt to a breach of duty, it is enough if it *tends* to do so by supplying a motive which—whether successfully or unsuccessfully is immaterial—engages in a struggle with those desires which indicate and demand that the act be done. If it does so much and no more, the sanction is operative, though not necessarily effective, and if it has been at work to this extent, we are entitled to punish him who has disregarded it—unless, indeed, the force that drove him to action has been irresistible in quite a different sense.

But in what sense? The test suggested by Stephen in the Criminal Code Bill of 1878 is whether the impulse to commit a crime was so violent that the offender would not be prevented from doing the act by knowing that the greatest punishment

permitted by law for the offence would be instantly inflicted, "the theory being that it is useless to threaten a person on whom, by the supposition, your threats will have no influence." This 'theory' of the learned judge is based on the same hazy notions as to the way in which sanctions must operate on the mind of a person to render him responsible, to which I have just drawn attention; he, too, makes it a condition of punishment that the sanction must be effective, not merely operative. But leaving aside his mere theory and coming to his practical test, we must next ask, who is to solve the puzzle whether the offender would have been prevented from doing the act by such knowledge as Stephen requires? It is certainly beyond the ken of the medical profession. And, finally, it is by no means rare that crimes are committed by those who are not subject to any mental disease, under the very circumstances and with the very knowledge which the learned author suggests as the criterion of an uncontrollable impulse; men carried away by intense human passions, hatred, revenge, jealousy, love, commit violent acts of crime in the light of the day *coram publico* with the certainty of being promptly brought to justice and of paying the full penalty of the law; more than once the criminal, before doing the deed, has given expression to his settled determination to execute it "even if I swing for it," and it is not so very rare that, as soon as it is consummated, he gives himself up to the police. Impulsive many of these acts have certainly been; and the strength of the impulse may be gauged by the fact that the actor does it with the full certainty that "the greatest punishment permitted by law" will be promptly inflicted. But we give effect to our conviction that the prisoner could have helped committing the crime—in other words, that the impulse was not uncontrollable—by letting the hangman do his work. Moreover, if we analyse the list of suicides committed year by year, we shall soon be convinced that a fate equal to that which the law reserves as a punishment for the blackest type of crime, does not necessarily deter those who are insane only in the theory of "crowner's-quest

law." Besides, it is an everyday experience that men will encounter certain death from motives such as honour, patriotism, duty, which are not more powerful to their minds than are the animal longings to which the criminal yields. In one case, indeed, a criterion similar to that laid down by Stephen has been submitted to the jury; it was Bramwell, B., who clothed it in the form of the question: "Would the prisoner have committed the act if there had been a policeman at his elbow?" I hold that the standard to which an impulse must come up in order to exempt from punishment as laid down in such tests as these is a much too low one, and I maintain that an impulse ought to be called irresistible and to be admitted in excuse of crime if, and only if, it is proved to be irresistible in this sense, that nothing but mechanical restraint could have prevented the act.

And here the question naturally arises: Do impulses answering this description ever occur in a state of consciousness? Opinions differ. That some of those who affirm the existence of irresistible impulses do not attach to the term the strict meaning in which I understand it, is shown by their calling the impulses "more or less uncontrollable." At any rate, we must here insist on the maxim: "Ei incumbit probatio qui dicit, non qui negat." Those who are inclined to answer in the negative have on their side the authority of Griesinger, who seriously doubted whether impulses were ever irresistible even in those notoriously insane.

That the power of self-control is weakened in all lunatics and that the insane are, as a class, prone to act upon impulses, are undeniable facts. Some alienists, however, describe a special form of lunacy under the term 'impulsive insanity' as being characterised by morbid irresistible impulses to do foolish, absurd, or criminal acts, and by nothing else. Impulsive insanity, thus understood, is one variety of the genus variously described as 'affective,' 'instinctive,' 'lucid insanity,' 'mania sine delirio,' 'folie des actes,' and of which 'moral insanity' is the other. I premise that the authorities are by no means

consistent in the use of these terms and that, more especially, impulsive insanity is often misnamed moral insanity. I use this latter expression with the signification which Pinel gave it, and I devote to its consideration a special chapter. Now the existence of affective insanity as a type of mental disorder and apart from any accompanying derangement of the intellect is not an admitted fact of science, but a mere theory which is still the subject of dispute and controversy, and which at the present moment sees the majority of writers of repute in the opponent's camp. It is a postulate of this theory that the mental faculties, instead of being mutually interdependent, are independent of each other to that extent that it is possible for the will to fall a victim to disease which leaves the reasoning powers unaffected. Starting from the proposition which they call an elementary truth of psychology that "the impulses to action, sane or insane, spring not from the intellect, but from the affective nature, the function of the intellect, like that of the steersman at the helm, being merely regulative," those who support the theory of a partial insanity in the above sense, assert that if the will is in that morbid, 'paradoxical' state which is characteristic of impulsive insanity, the emotional reactions are exaggerated to such an extent that feeling is rapidly converted into action, without ever falling under the controlling influence of the highest centres which preside over the faculty of discrimination; thus it comes about that an irresistible impulse may co-exist with full possession of reason. Now if irresistible impulses do exist, and if this is the manner in which they originate, the acts which can be shown to be their outcome ought certainly to be dispunishable. And why? Because the actor does not know what he is doing. It is true, his intellect being clear, he appreciates the nature and quality of his act, but only after it has been done. He appreciates it in the same way as any stranger who happens to be present, and the fact that his body is the stage on which the drama is performed is a mere accident which cannot render him responsible. At the critical time, *i.e.* at the time of doing it, he is not

alive to it: the act is merely a kind of mental reflex phenomenon which takes place before the feeling which excited it has had time to enter consciousness. Here again, then, an independent power test would be an unnecessary luxury.

Emotional insanity is heard of in courts of law under two different sets of circumstances. To one of these classes Mr. Maine applies the highly appropriate term 'inferential insanity.' "In cases of this sort no suspicion of insanity would rest upon the prisoner, apart from the crime. But from the character of the crime itself, its suddenness, violence, and cruelty or atrocity, the apparent absence of motive or purpose, a suggestion is raised that the offender must have been insane at the time of its committal. A defence of this sort is usually set up when the facts admit of no other, and it is eked out with evidence of previous outbursts of eccentricity or violence, and suggestions of hereditary insanity, or former diseases which might possibly have affected the brain." 'Mania transitoria' is the diagnosis which medical experts advance in cases where the act itself is the only symptom of mental disease. No doubt, Dr. Maudsley is right if he remarks: "Unwarrantable as it may appear to assume a crime to be evidence of insanity where there have not been any previous symptoms to indicate disease, it is still possible that the crime may mark the period when an insane tendency has passed into actual insanity—when the weak organ has given way under the strain put upon it." The commission of a crime by a person who has never been suspected to be insane by his friends or relations, may certainly be the occasion which first attracts attention to his mental condition and causes him to be, for the first time, subjected to medical examination; but the alienist will discover independent signs of undoubted lunacy, apart from the criminal act, and that which strikes him as peculiar in the act itself will not be the only material for him to work upon; it will in his hands be merely an index to the discovery of those morbid phenomena which enable him to diagnose an ordinary mania, melancholia, delusional, epileptic, hysterical insanity. But he will not then speak of 'mania

transitoria.' By the latter expression is meant, in the words of Mr. Justice Depue (*St.* v. *Grave*, 5 N. J. L. J. 54), "an instantaneous temporary madness which begins in the eve of the criminal act and ends when it is consummated." Now the best medical authorities are all at one that a *mania transitoria* in this sense of the term does not exist. And even if it does exist, the judge is not only entitled, but bound, to refuse recognition to a form of lunacy that is inferred merely from the criminal act itself, and must, *ex hypothesi*, be necessarily uncorroborated by any extrinsic sign of mental disease—unless it is possible to lay down distinguishing marks which enable us with certainty and precision to distinguish between an insane and a criminal act. We have it on the authority of Skrzeczka that the only act, criminal or otherwise, which (in civilised countries), of itself and without more, conclusively proves insanity, is anthropophagy. I have scanned the medico-legal literature for the pathognomonic signs of the insane act, and I find that they are four in number: want or inadequacy of motive, the atrocious character of the act itself, extreme imprudence, in its execution and the conduct of the actor after its perpetration. Dr. Mercier goes even so far as to enumerate two of them, viz. extreme inadequacy of motive and extreme imprudence in the act, among those circumstances which, if proved, should each by itself in all cases establish the plea of insanity. Let us examine each of these marks in detail. It would be rash to conclude that no motive exists because we fail to discover one. "Motives exist unknown and innumerable which might prompt the act" (Bramwell, B., in *R.* v. *Haynes*, 1 F. & F. 766); and, as against the mere assertion of the medical experts, the question of Baron Rolfe (in *R.* v. *Stokes*, 3 C. & K. 185 (1848)) is very much in point: "Who enabled them to dive into the human heart and see the real motive that prompted the commission of such deeds? It is dangerous ground to take to say that a man must be insane because men fail to discern the motive for his act." And equally fallacious it is if we neglect the personal factor and all the thousand and one

imponderabilia which have to be taken into consideration in order to arrive at a satisfactory psychological analysis of the deed, and conclude that the act is out of all proportion to the motive which prompted it, simply because it appears so to us from our own standpoint, from the standpoint of an intelligent, educated, cool-headed, and unconcerned observer. Have we not all in the heat of passion done things which the provocation we had received did not in a calmer state of our minds appear to justify? And as seen from our own visual angle, does there a motive exist commensurate to the commission of a murder? That every blood-curdling crime by its very atrocity indicates insanity seems to be acceptable only if modern mental medicine is prepared to revert to the views of Hobbes, who indeed teaches that "all passions that produce strange and unusual behaviour are called by the general name of madness," and who accordingly defines insanity as being "nothing else but too much appearing passion." Then, but not otherwise, can it be right that the more heinous the offence, the more certain the offender can be of escaping unpunished. And if extreme imprudence in the perpetration of the deed is taken as an index pointing in the same direction, the words of the *Digest*, "ira furor brevis est," are raised into a practical maxim of criminal law, and every *délit passionné* is covered by the all-embracing cloak of the plea of insanity. But "it would be a most dangerous doctrine to lay down that because a man committed a desperate offence with the chance of instant death and the certainty of future punishment before him he was therefore insane, as if the perpetration of crimes was to be excused by their very atrocity" (Rolfe, B., in *R.* v. *Stokes*). As to the subsequent conduct of the actor whose act is a mad one, there is a great diversity of opinion among the writers. Some describe his condition as one of deepest despair, whilst others are struck by his callous indifference to the enormity of his crime; and some of the latter have even an explanation to offer: he feels no remorse, they say, because he knows himself free from all moral guilt, his volitional self not concurring in

the act, the act not being his at all. But whether repenting or unconcerned, he is said to confess his crime, and in many cases his first act is to give himself up to justice. "Exceptions, however, occur where the subject of insane impulse endeavours to conceal his crime like the responsible criminal." I think that the mental moods alleged to point to insanity exhaust all the possible states of mind which the ordinary criminal may exhibit after the commission of the act; and since contrition and cynicism are said to prove the same thing, it will be owned that neither is of much value as a means of discrimination between an insane and a criminal impulse. We see, then, that the tests of an insane act laid down by the text-book writers all break down when applied in practice; and if their *ensemble* cannot be said to be worth much, far less can it be conceded that "though the various factors are rarely all present together in the same case, the concurrence of some of them has already a very important diagnostic significance." And if we finally remember that these signs are not of such a nature as to require the argus-like eye of the trained medical observer, but that the experienced criminal lawyer is at least as competent to discover and appreciate them, we cannot wonder that the expert does not find much credence on the bench if, guided by them, he infers insanity from the deed alone.

The second form in which impulsive insanity comes into contact with the law, is represented by 'monomania' in one of the meanings of the term. The word is employed with two different significations, distinguished by Esquirol as intellectual and instinctive monomania respectively, the former denoting "an insanity which is indicated by some one particular delusion, the mind remaining clear on every other point," the latter a mental derangement without delusion in which the will alone falls under the spell of disease, and in which the patient exhibits an insane tendency to act upon impulses which he is unable to control. Mental disease characterised by isolated delusions is but a variety of intellectual insanity, and, therefore, foreign to the subject now under consideration;

we shall deal with it under the heading "Partial Insanity." Here we are concerned with instinctive monomania alone. This differs from transitory mania in that the latter exhibits itself in one single act,

> "the flash and outbreak of a fiery mind,"

whilst in monomania there is

> "a savageness in unreclaimèd blood,"

a *tendency* to do acts of a certain, and in the same individual always of the same, kind—unless, indeed, a man might be affected, as Baron Bramwell suggests, with two of them, when the learned baron would speak of bimania. A stately number of monomaniae have been described and dignified with special denominations: an uncontrollable impulse in the subject to kill himself or others (suicidal and homicidal monomania), to possess himself of the property of others (kleptomania), to burn (pyromania), to commit indecent acts (aidoiomania), to ill-treat children (misopaedia), to use bad language (monomanie bestamiante). But whatever the special form which it assumes, monomania is said to be paroxysmal in character, manifesting itself by fits at irregular intervals, and in many cases at least intimately connected with imperative conceptions. The attack itself is depicted by writers on forensic and mental medicine somewhat as follows: It is preceded by disturbance of bodily health, particularly of the vasomotor and sensory sphere, by headache, neuralgia, sleeplessness, restlessness, palpitations, cold sweats, a general state of anxiety, oppression in the precordial region, and occasionally by digestive troubles. Then arises an instinctive desire, the origin of which the sufferer cannot explain, to do some act the extravagance, perverseness, or gravity of which he fully appreciates. He bravely fights against the impulse which every moment gains in strength. Meanwhile, the physical pain or discomfort, characteristic of the prodromal stage, not merely persists, but increases as the satisfaction of the cogent desire is delayed. But the bodily suffering is as nothing compared with the

mental agony which results from his conscious efforts to defeat the mad impulse which is all the time felt to be overmastering. Often, indeed, the patients succeed in controlling the insane instincts, and after an attack of shorter or longer duration return for an indefinite time to their normal state. Sometimes, however, all is in vain, and the sufferer cannot find rest till at last he gives up the struggle which he feels it useless to prolong and lets the imperative impulse have its own way. An act is done which is both foreign to the disposition and against the inclination of the actor, "far removed from the fundamental instincts that are identified with self," the mere work of a parasite implanted in the brain which saps all the organic strength of the mind, a weed grown out of

> "the insane root
> That takes the reason prisoner."

The actor himself looks upon the act as the dispensation of a cruel destiny; and yet the act which he loathes and abhors is both voluntary and intentional. Of these sufferers it may be said in truth:

> "Che la divina giustizia gli sprona
> Sì, che la tema si volge in disio."

The deed once accomplished, the patient experiences an immediate physical and mental relief, sometimes even a sense of exceptional well-being, and all this though the gravest legal consequences may await him. It is only after some time and on mature reflection that the situation appears in its true light to the actor, who now for the first time repents the deed. Accepting, for a moment, the above account as an accurate and exhaustive description of a real morbid condition, we may well stop and ask whether the impulse is here uncontrollable in that sense in which we understand the term. Morbid and powerful the impulse is; but is it stronger than that which, the outcome of the most fundamental human instinct, the instinct of self-preservation, drives the starving man to steal a loaf from the nearest baker? No

judge, it is true, would be hard on such a criminal; but no judge would think of declaring him an irresponsible being either. The temptation to which the monomaniac yields is certainly of the most pressing order; but is it more so than that gnawing hunger which impelled the unfortunate defendants in the *Mignonette* case? If it is said that the mother who, in an attack of homicidal mania, kills her darling child, acts without motive, I reply that she has a motive, a morbid one it is true, but one of a most urgent kind all the same, viz. the desire to rid herself of that bodily and mental agony which goes on increasing so long as she resists, and disappears as soon as she satisfies it. The difficulty which other sufferers have experienced in resisting similar impulses which they have yet conquered, the fact that the accused himself has, on previous occasions, conquered his mad desires, and that he has long fought against them, even in that instance in which he finally yielded, are all advanced as arguments that the impulse has been unconquerable when the act was done; in my opinion, they prove rather the contrary. For if others have been successful, why not he? And if he has gained the victory on former occasions, why not on the present one? Even amongst the sane, it is but the hard-sodden habitual criminal who yields without a struggle as soon as a temptation is offered. It may, indeed, appear odious to follow to this length a line of reasoning when its searchlight is directed against the poor victims of disease; but nothing less ought to satisfy a scientific inquirer than the clearest truth, however unpalatable it may seem in its nakedness. Nor is a charge of inhumanity here justly levelled at my head, and for a reason which will presently appear. The reader, after perusing the graphic account which I have given of monomania, and which is largely composed of fragments bodily taken from various articles on monomania, has, I suppose, a very vivid picture in his mind of the nature and character of the disease under consideration; and it will come to him both as a surprise and as a shock to learn that the best modern

authorities deny its very existence. That an insane person may have a raven-like propensity to steal or a strong desire to kill or burn is well known; but that there are such distinct forms of lunacy in which the mental defect is limited to a given perversion, the mind being healthy in all other directions, is not admitted by the modern teachings of psychiatric science. When such impulse is alleged in defence of crime, one has to search for other evidence of mental illness, particularly in the intellectual sphere, and if it is forthcoming, the case is not one of monomania, but of ordinary insanity, the tendency to do impulsive acts being merely one, maybe a prominent, symptom. But if the expert fails to find other signs, we may feel confident that we are dealing with crime and not with disease. Baron Alderson anticipated this modern doctrine when in *R.* v. *Pate* (*Times*, Dec. 12, 1850) he remarked: "A man might say that he picked a pocket from some uncontrollable impulse, and in that case the law would have an uncontrollable impulse to punish him"; and no less modern was Mr. Justice Byles, who, to the query of learned counsel appearing on behalf of an alleged kleptomaniac: "Of course, your lordship knows what that is," is reported to have replied, "Oh, yes; and I am here to cure it." The up-to-date trial of a well-to-do thief seems to have been a poetical vision of the author of the "Canterbury Tales," where he sings:

> "To a poure man shuld his vices telle,
> But not to a lord though he shuld go to helle."

One class of morbid propensities is accorded a special prominence in medico-legal literature and, at any rate on the Continent, is constantly brought to the notice of the tribunals by advocates and experts: I mean the aberrations of the sexual instinct. Opinions differ where the boundary is here to be drawn between vice and disease; but granting that sexual perversion, unaccompanied by any other manifestations of insanity, may yet be due to disease, the question arises which is frequently argued in foreign courts, more especially in cases

of homo-sexuality: Should persons who indulge in the gratification of their abnormal lusts escape punishment? The impulse *ex hypothesi* is morbid; but is it irresistible? Can the sufferer not help proceeding from desire to act? We do not know. The reproductive instinct is indeed one of the strongest even in the healthy, and in some individuals it is of exceptional vigour. Yet what judge would listen to such a defence in a trial for rape? I do not forget that it is impermissible without more to apply experiences made in the healthy to those the subject of disease; where the instinct is perverted, it may not merely be altered in kind, but also tremendously exaggerated in strength. All that I claim is that it has never been proved to be so, that it cannot be presumed to be so, and that the burden lies on those who claim that the vagaries of the sexual impulse should excuse acts done in obedience to them.

Having passed in review the various types of impulsive insanity, we have seen that the preponderance of medical opinion is against its existence in any of its forms: "the actual term impulsive insanity finds no place among the labels for classes of insanity." (Taylor.) We have also learnt that the best medical authorities entertain, to put it mildly, serious doubts as to whether an impulse is ever uncontrollable even among those avowedly the subject of mental disease. The true difficulty to the lawyer is not, however, in the abstract question as to the existence of impulsive insanity and irresistible impulse, which after all is one of fact and one for medical science alone to decide, but in the proof of its actual existence when pleaded as a justification in any concrete case. The recognition of unconquerable impulses throws on the medical witness the full responsibility of drawing a sharp line of demarcation between an act which is and an act which is not the unavoidable outburst of pathological necessity. Does his science enable him with accuracy and precision to draw this line? Outside the deed itself, medical psychology has up to now failed to discover anything which may serve as a guide to the solution of this problem. Old Zacchia already remarked:

"Doctores communiter dicunt furorem et dementiam probari ex factis." But even the intrinsic marks said to be pathognomonic of an insane act the product of irresistible impulse are all and every one of them met with in crimes committed by persons as to whose mental health nobody entertains any doubt. For medical purposes the inferences drawn from the act itself may be sufficient: "Medical science can deal with inscrutable facts and must act as best as it can upon them." No so for the purposes of legal adjudication. "When courts and juries are called upon to apply the principles and deductions of science in the process of judicial investigation, it is indispensable that their tests should be such as are capable of being appreciated and judged with some approximation to certainty." (Allen, J., in the case of William Spiers. *American Journal of Insanity*, vol. xv., p. 200.) Where are those tangible signs which a medical witness can put before the court convincing enough to enable a jury to differentiate between an irresistible impulse and one which was merely unresisted, and again between the loss of self-control of passion and that of disease? We have already more than once pointed out that an outbreak of lunacy does not extinguish the flames of ordinary human passion; and if we remember that the violent excitement in which atrocious crimes are most often committed by those in mental health, may lead to an extravagance of conduct closely resembling that produced by insanity, we shall appreciate how extremely thorny the problem is and how wellnigh impossible it appears to be to say in the case of a madman whether he was impelled to act by mere passion or by his disease. The plea of uncontrollable impulse thus presents to the legislator difficulties which, in the present state of medical knowledge, must seem insurmountable. He finds himself placed before the following alternative: he must either admit the defence on the mere assertion of the professional expert and thereby sanction a system which tends to encourage vice, to endanger the safety of society and to subvert the fundaments of criminal justice;—or he must refuse to give legal recognition to the plea and with

stoical indifference face the clamour of hundreds of voices charging him with unscientific inhumanity. The codes which provide that loss of self-control shall exempt the insane from punishment, have chosen the former plan as the lesser of two evils. If, on the other hand, the English law obstinately clings to its exclusive knowledge test, its reason is not an unwillingness to conform to the data of medical science, but its deep insight into the imperfections of that science itself, which entitles it to regard with suspicion such an excuse as an ungovernable impulse "which co-existing with a knowledge of right and wrong would"—till alienists have pushed much farther their researches—"justify any crime whatsoever." (*R.* v. *Burton,* Huntingdon Summer Assizes, 1848.) Our law does not wish to place judges and juries in the awkward dilemma of either unreservedly delegating their combined functions to the professional witness or of "becoming bewildered and lost in the labyrinth of scientific niceties and fanciful theories." (Allen, J., in Spier's case, *loc. cit.*) It was considerations such as these which caused the commissioners to suppress, in Sec. 22 of the English Draft Code, the uncontrollable impulse which had been inserted, as a ground of immunity, in the case of lunatics in the corresponding section of the bill. Remembering the maxim of the sage of medical jurisprudence: "Dementiae est difficilis probatio, ita ut testibus de ea deponentibus non sit credendum nisi assignent rationem sui dicti," the English law ought to stop where it does now, till alienists have fully established

(1) The existence of an irresistible impulse *strictissimo sensu;*

(2) A reliable criterion by which it can be ascertained in the usual methods of trial with sufficient certainty for judicial purposes.

CHAPTER XI.

MORAL INSANITY.

"τοῖς διὰ φύσιν αἰσχροῖς οὐδεὶς ἐπιτιμᾷ."

Aristoteles, Ethics, iii. 5.

"Quid leges, sine moribus
Vanae, proficiunt?"

Horace, Carmina, iii. 24, 33.

"The law is not made for a righteous man, but for the lawless and disobedient, for the ungodly and for sinners."—1 Timothy i. 9.

"MENTALLY," it has been said, "man is a dualism, consisting of an intellectual and a moral nature." In studying the effects of disease on the brain, we have, therefore, to take into account not merely its destructive influence on the intellect, but also its interference with man's moral character. For the moral sense itself, says Maudsley, is but a function of organisation and as essentially dependent upon the integrity of that part of the nervous system which ministers to its manifestations, as is any other display of mental function.

In order to understand the pathology of conscience, let us first inquire what are its elements, its nature, its origin in the healthy. Every sense perception which reaches our brain, every thought which presents itself to our mind, every idea which passes over the threshold of consciousness, every conclusion we arrive at is accompanied by certain feelings which lend it colour, or to use a term borrowed from the physics of sound, determine its 'quality,' its '*timbre*'; and human conduct is not exclusively dictated by trains of thought and logical deductions, but materially influenced by the 'mood' of the actor at the time of the act, *i.e.* by the then state of his emotions. So much must be conceded even by those who, like

myself, are not prepared unreservedly to subscribe to the teaching of that master of psychiatry who maintains that, even in man's ordinary condition, sentiment dominates all the functions of the human brain, or to the doctrine of Maudsley that it is from the affective sphere that all impulses to action spring. Now, in the healthy mind, the concomitant feelings are in perfect harmony with the results of reasoning; thus if we *think* we had better refrain from a certain line of action, we *feel* at the same time a dislike for it, and we unconsciously give expression to this truth by saying that such line of action appears to us 'undesirable.' The aim of education is to bring about this consonance of intellectual and emotional life, and it attains this object by following the child's words and deeds with appropriate expressions of praise or of blame, with gestures of applause or resentment, and thus habitually associating in its mind with every thought the sentiment which accompanies such thought in the minds of its fellow-creatures, in other words its normal sentiment. Man thus learns to adapt himself to the moral milieu in which he lives, and he learns it in exactly the same way as he adapts his body to environments and habits which are not found in a state of nature; and so it comes about that "the normal adult not merely submits to, but appreciates as obvious facts and almost as matters of course the postulates of the law which, in the tangible form of legislative sanctions, restrict the personal freedom of the individual in his relations with his neighbours singly and with the social organism." (Borri.)

Mental defect or disease may bring about an estrangement between thought and feeling, a chaotic state of the soul in which the intellect, instead of finding a responsive echo in the affections, meets with no sympathy from the emotional nature. Deliberations on the most serious and solemn problems then become the source of unbounded frolicsomeness; the saddest event fills the heart with mirth and joy; actions which reason demonstrates to be highly reprehensible, meet with cold indifference, if they do not excite feelings of approbation instead

of horror. Normal notions, correctly appreciated by the intellect, thus become caricatures when reflected in the vexing-glass of the emotions, and it cannot be surprising if individuals with such a contrary mind are prone to act in a contrary manner. Such persons suffer from an ethical defect, the loss of the moral sense.

"The moral sense represents the highest function of the human brain, and for that reason, on well-known principles of evolution and dissolution, is the last (the most difficult) to be acquired and the first to be lost from disease." (Sachs.) No wonder, therefore, that when the storms of disease break in upon the human brain, that most highly organised and most delicate plant, conscience, should first be swept away; and we can also well understand that cases of insanity occur in which derangements of the moral character are more prominent than disturbances in the sphere of intellect. Esquirol, indeed, declared moral alienation to be the proper characteristic of mental derangement, whilst a special disorder has been described in which the symptoms are only displayed in the state of the feelings, affections, temper, and where, without disturbance of the intellect, perversion of the moral sense occurs to a degree inconsistent with due control of the actions: this is the moral insanity of Pinel which together with impulsive insanity forms that group of mental diseases to which the term affective or lucid insanity has been applied. Moral insanity, we are told, may be either congenital or acquired. On the latter form in which the moral faculties once fully developed are subsequently destroyed by illness, the intellect remaining intact, the authorities have very little information to offer beyond the fact that it may be caused by typhoid fever, traumatism, or other brain lesion. The congenital variety, on the other hand, which, according to traditional terminology, is understood to include cases where the defect is contracted in earliest infancy, occupies a very important place in the literature of the nineteenth century; it is regarded by modern alienists as a species of the genus idiocy or imbecility and is,

accordingly, distinguished from the acquired form by the name moral idiocy or imbecility. The patients answering this description are usually descended from a neuropathic stock and, whilst displaying a normal development, sometimes an exceptional brilliancy, of all those faculties which constitute intellectual life, they suffer from an innate incapacity to assimilate the moral law governing the society in which they live. No doubt, parents, parsons, and schoolmasters may succeed in beating ethical rules into their heads; but being committed to memory, they remain silent in a mind in which the sounding-board of moral feeling is wanting and, like commands addressed to them in a language which they do not understand, they remain unobeyed and without influence upon conduct. Such persons whose mental conformation is defective in those powers which stand highest in the evolutional order, are out of harmony with their environment and ill-fitted for the conditions of life in highly civilised societies. They exhibit, in fact, a retrogressive, an atavistic phenomenon, a reversion to the state of primitive man, of the savage, the suppression of the moral sense giving free play to all the egoistical tendencies of human nature. And this is why Schuele has not inappropriately termed moral insanity "the madness of the altruistic feelings." Here we are also at the point of contact between the moral imbecile and the born criminal of Lombroso who himself openly proclaims the identity of the two types.

The suppression of the moral sense, whether merely a symptom of general insanity or constituting in itself the whole of the disease, ought, in the opinion of many medical writers, to negative criminal responsibility; and some legal systems have given effect to this claim by recognising moral insanity as a ground of exemption from punishment. The arguments with which this demand is supported, are somewhat of the following kind: The reasoning powers of those who, either by congenital defect or by disease, are deprived of the moral sense, may be weakened, normal or of a high order. If feeble, they are

insufficient to regulate and direct the affective side of the mind. If of average degree, there is yet a disturbance of mental balance; for uncorrected by moral sentiments, low appetites, base instincts, brutal passions which are here the only manifestations of emotional life, gain an inordinate strength, and an amount of intellect which would have been competent to keep them down, had they been at their normal level, is utterly inadequate to cope with them when thus exaggerated. And the higher developed the intellect, the worse matters become; for it exhausts its functional activity in ministering to the egoistical tendencies of those morally blind creatures, by supplying them with considerations of what is useful, what detrimental, as the only guide to conduct. It is true, such individuals may know the difference between right and wrong; but such knowledge, untinged with feeling, is merely so much mental ballast, useless for all practical purposes, incapable of supplying motives and counter-motives to action. They may know the rules of morality, but they do not feel them; and since man is guided by feelings quite as much as by knowledge, it must necessarily follow that those whose feelings are immoral, will do immoral acts. They may know the law and its sanctions; but since they are out of touch with the dictates of current morality which underlie it and, therefore, unable to comprehend the spirit of the law, "the criminal code, in their eyes, is a matter of no more consequence than a collection of police-regulations has in the eyes of the normal member of society" (von Krafft-Ebing), and the most heinous crime calls forth in their minds no deeper resentment than the breach of a bye-law made by Scotland Yard does in our own. Such persons, then, may be acquainted with the precepts of both morals and law; but not being able to associate any feeling with them, they never succeed in assimilating and appreciating either. And "an act to be imputable, must be appreciated, not simply enter consciousness." (Borri.)

And here I must stop to point out the fundamental difference which exists between absence of the moral sense and

incapacity to distinguish between what is morally right and morally wrong, as grounds of exemption from punishment—a difference which does not seem to have occurred to any writer on the subject, whether from the medical or legal standpoint, with the single exception of Russell Reynolds, who appears to have clearly perceived it when he wrote: "It does not seem to me that a very obvious distinction has, in our own courts of law, been always drawn between two things which differ widely, viz. the presence and condition of the moral sense in itself and the faculty for its correct and special application to special acts"; and even this distinguished physician, after having drawn attention to this difference, before long loses himself in a hopeless confusion of those entirely dissimilar states of mind. He rightly proceeds to remark that in cases of insanity "there may be the keenest sense of right and wrong in the general; the very strangest *feeling* with regard to moral obligation underlying such sense; the most earnest wish to do the one and avoid the other; and yet an utter perversion of *idea* with regard to particular courses of conduct." Here not the moral sense, but the reasoning powers are at fault; if the patient goes wrong, it is because he is prevented, by hallucinations, delusions, illusions or mere want of understanding, from subsuming particular acts under their appropriate moral categories, though these moral categories may *in abstracto* be present in his mind and accompanied by the normal moral sentiment; the want is one of knowledge, due to disease, and whether the knowledge which is missing, refers to the nature and quality of the act or to its legal or moral character, is, from a psychological point of view, more or less a matter of accident. Such patient is suffering from ordinary so-called intellectual insanity, not from moral insanity. In cases belonging to the latter form of madness, the exact reverse of the medal is met with: in them the reasoning powers may be of the highest order; not only do these individuals know and understand moral and legal rules of conduct, but they can apply such knowledge to the consideration of a definite line of action; what they are short of, are the

feelings which, in the healthy, are inseparably connected with knowledge; and if they commit a crime, it is because, though they know, they do not feel that they are doing wrong.

Before embarking on a systematic criticism of the claim that absence of the moral sense should excuse crime, I think it best to describe in detail and to illustrate the condition of persons suffering from such defect. To put the question at issue in its clearest light, I shall, for the present, discard from our discussion those cases in which lack of moral sentiments is merely one symptom of mental disorder, and choose as the subject for scientific dissection the moral imbecile in the strictest sense of the term. I am quite prepared for the objection that an investigation, thus limited, can be of little practical value, since the best authors of the present day are agreed that there is no disease characterised solely by a deficiency in the moral sphere without impairment of the intellectual powers as well, and that when defective moral sense is the only evidence of mental unsoundness, the diagnosis of insanity is never justified. I am fully alive to the fact that Meynert, Mayo, Brodie, Taylor, Mendel, Binswanger, to mention but a few names which carry weight, are all in substantial agreement that "there are no reasonable grounds for admitting moral insanity to be an independent form of mental disease," and that that large and influential body, the American Medical Association, at a well-attended meeting held at Chicago in 1877, on the report of Dr. R. J. Patterson, by a unanimous vote decided that the experts of that continent do not recognise the existence of moral without intellectual insanity. (*Transactions Am. Med. Ass.*, vol. xxviii. pp. 359–64.) A perusal of my chapter on 'Partial Insanity' will, moreover, show that I am in complete sympathy with this view. Even among those who are unwilling to sacrifice the term, not a few retain it merely as a convenient formula for that clinical type in which, though the whole mind is under the shadow of disease, the defective moral sense is the most striking symptom, whilst the intellectual disturbance is difficult of detection, and escapes

notice until a careful examination by the experienced alienist establishes the existence of numerous other evidences of insanity than mere moral obliquity. If, in the face of such overwhelming authority, and in spite of the opinion which I hold myself, I yet insist upon selecting for study a model in which moral perversion is the only morbid phenomenon, it is not out of deference to those prominent writers—and there are still a good many of them—who still cling to the antiquated doctrine. I do it because I am fully convinced that the moral sciences, including that of legislation, will but slowly advance until they systematically apply those methods of research which, in natural science, have been crowned with such signal success. Now what does the physicist do when dealing with the motions of a body upon which a system of forces acts? He isolates them and ascertains their results singly, as if each one of them were alone at work; and if he finds that any of them would by itself impart to the body a certain velocity and impel it in a certain direction, he at once knows that it will still tend to do so, however numerous are the forces which operate upon such body and however complex their play. So if we want to discover what changes in the mental *habitus* the loss of the moral sense brings about, and how, if at all, it interferes with the operation of the legal sanctions upon the mind, we must eliminate the disturbing influence of a deranged intellect and inquire how the abolition of the ethical instincts modifies conduct, where the reasoning powers are intact.

The cardinal symptoms of moral insanity are, according to Kovalevsky, the following: Powerlessness of the intellect in its struggle with the emotions and domination of the latter over the mind; entire absence of all noble human aspirations and tendencies, the latter inspiring these subjects with nothing but scorn, contempt and hatred; exaggerated development and prevalence of the passions and sensual appetites; a sensuality of the lowest and vilest order; conflict between the deductions of reason and the will; and finally, manifestation of all anti-social qualities. The history of a case of moral imbecility is

somewhat like the following: Usually the victim of hereditary mental derangement, the patient exhibits depraved tastes from early childhood and, proof against the moral influence of the family circle, he grows up cruel, mischievous, untruthful, thievish. At school all attempts at forming character are quite as futile as those made at home, and he is perhaps sent away from one school after the other on account of his vicious propensities. At the age of puberty matters often get worse, and he may prove utterly unmanageable and incapable of being trained into his duties to society. Devoid of all altruistic sentiment, unable to "understand that there is any such thing as a moral significance in truth or falsehood, stealing, cruelty," inclined "to break nearly all the commandments of the decalogue," revelling in acts of the most barbarous cruelty, demoniacal vindictiveness and in sexual excesses of every possible kind, he becomes a thoroughly *mauvais sujet*, the black sheep of his family. Obedient slaves of every caprice of the moment, such individuals begin everything and accomplish nothing. Their character is and remains bizarre, phantastic, changeable, and their whole life becomes but one long series of eccentricities, queer deeds and extraordinary adventures. The violence of their instincts, which are often perverse, drives them on to commit the rashest acts, the most daring crimes. In their "moral colour blindness," the whole of our civilisation, the whole social, moral and political order of things appear to them mere useless fetters that prevent them from the gratification of their base tastes and depraved desires. Unable to appreciate their value, they thus refuse to follow the rules of conduct observed by everybody else, and are in open rebellion against all authority. Incapable of entertaining ethical considerations, "their mental functions are restricted to that range of ideas which is concerned with the utility or hurtfulness of intended acts," and their freedom of will is limited to balancing this narrow order of motives against the storms of passion, exaggerated and distorted by disease. Such intellectual ability as they have is applied to ignoble ends, and

refractory as they are against all corrective and repressive measures, they form a large contingent of our prison population. And yet "so unstable, so unsettled, so inconsistent are they, so incapable of systematic effort, that they cannot even become hardened criminals. Owing to their boundless egotism, they are unfit to act in concert with any one else: every deed they do, they do single-handed; they are incapable of organising a complot, a conspiracy, a common course of action. . . . The character of the crimes committed by such subjects bears the impress of a conglomerate of isolated, incoherent deeds, executed without any regular plan, without any system, and without the aid of any one else." (Kovalevsky.) An instructive example of the type of criminals to whom the description 'morally insane' is applied, is quoted by Griesinger: An individual having noticed that every time a fire broke out in his village, the communal authorities gave free beer to those who had assisted in extinguishing it, resolved to put fire to a house for the purpose of procuring himself the pleasure of drinking at the expense of the community. When asked, in the course of his trial, whether it never struck him that arson was a felony, he replied: "Of course, I knew it well; but the criminal code puts no man in fear who wishes to accomplish an object which he cannot otherwise attain."

I have attempted, in the preceding analysis and description, to present the strongest case which can be made out in favour of admitting the loss of the moral sense as a defence. Let us now examine this claim in detail. First of all, nobody, I suppose, can have read the life history of the moral imbecile which I have sketched, without being struck by, to put it mildly, a very strong family likeness between him and many an ordinary criminal who is acknowledged to be in the possession of full mental health. We have already seen that Lombroso actually identifies the moral imbecile with his criminale nato, and others who do not go quite so far, yet point out the strong analogy between moral insanity and criminality pure and simple. "In radice conveniunt" says Moreau of Tours, and

Vibert, who quotes this dictum with approval, confesses that the distinction between them is often a little artificial and such as to shock common sense, though he sees in the attempt at discrimination between the two conditions the only means of reconciling the interests of society with our innate notions of justice. Nor does it help us to escape from this difficulty if we admit with Maudsley that "there exists a borderland between crime and insanity, near one boundary of which we meet with something of madness, but more of sin, and near the other boundary with something of sin, but more of madness." Who would feel equal to the task of making due apportionment between badness and madness, and of adjusting punishment accordingly, if justice were to be administered on a sliding scale? The writers belonging to those countries where moral insanity excuses, frankly concede that it is wellnigh impossible for psychiatry to solve so knotty a problem and that it is a matter of everyday experience to see the same individuals treated now as lunatics, now as criminals, and sent in turn to prison or to the asylum for acts in no way distinguishable. The revulsion of medical opinion to which I have drawn attention, will, it is hoped, in future spare us the spectacle of hearing in courts of law the diagnosis moral insanity made in the case of a prisoner who is perfectly sane on all other subjects, except those relating to moral obligations and conduct, of hearing the term applied in a sense in which it was always and rightly regarded by lawyers as nothing but a "medical definition of unmitigated depravity." But with all of that, the problem merely presents itself in another form. Unless we grant that all lunatics were models of moral virtue before the onset of their disease or that the outbreak of insanity has cured them of all vices to which human flesh is heir, it would still be necessary to inquire whether the crime of a madman which is the subject of judicial investigation, was the outcome of a morbid loss of the moral sense or of mere moral crookedness, and to search for a criterion enabling us to differentiate between the two. Furthermore, if we hold, as the best alienists undoubtedly now

teach, that the intellectual powers are hardly ever distorted without the moral feelings partaking of the disorder, then the recognition of the loss of the moral sense as an excuse for crime would be but a circuitous and cumbrous method of arriving at the doctrine of the French code. And if we wished, in practice, to avoid this conclusion which the logic of facts would force upon us, the want of a test by which abolition of moral sentiment through pathological causes could be clearly established as a provable fact, would make itself most sorely felt just in that class of cases where it is most needed, viz. in those alleged lunatics in whom the disturbance of the reasoning powers, though recognisable to the eye of the expert, disappears in the background, and who could not, therefore, successfully rely on the knowledge test. Neither moral imbecility nor the subsequent destruction by disease of the moral faculties, once developed, can be "with safety recognised by the law as exempting its subjects from punishment, until science is able to do that which it has not yet done, to define its evidences and the rules by which its existence could be ascertained and known." (Allen, J., in Spiers' case, *loc. cit.*)

But assuming our knowledge of mental disease had made so much progress that the expert alienist had at his command unmistakable criteria upon which to base his differential diagnosis between moral insanity and moral depravity, between him who, owing to arrested development of the higher levels of cerebral organisation, is unable, in spite of the best educational facilities, to imbibe moral sentiment and him who, through want of training, was never afforded an opportunity of imbibing them, would it be just to excuse the former, whilst we continued to make the latter feel the full severity of our penal laws? Would not the latter likewise be entitled to be heard if he raised that plea which Baron Bramwell puts into his mouth: "It is hard on me, I never had a chance to behave well; my parents were drunkards and thieves; so were all my companions; and instead of being ashamed before them if I stole, I was applauded for it if I did it without detection." I

cannot help feeling that he has a better claim to indulgence than the moral imbecile. The latter has, after all, but his parents and ancestors to blame for the shortcomings of his nature, whilst the man whose ethical potentialities remain dormant for want of suitable machinery to transform them into motor power, is a standing reproach to society itself which, having erected a certain moral standard into the fundament of its laws and institutions, neglects an elementary and most sacred duty if it does not take effective steps to ensure to every one of its members those educational advantages which alone enable him to come up to that moral level and to become a well-behaved and useful citizen. Plato, who ascribed all crime to defective organisation and defective education of the wrong-doers, was consistent enough to demand that their teachers should share with their parents the burden of responsibility. The position which I have taken up, seems to underly such legislative provisions as Paragr. 46 of the Austrian Criminal Code and Art. 15 of that of Bolivia, which enact that weak-mindedness and a greatly neglected education should equally be recognised as extenuating circumstances or as factors diminishing the guilt of the actor.

Granting, it may be said, that the uneducated criminal is as much entitled to our sympathy as the moral imbecile, there is yet this difference between them that the one is capable, whilst the other is incapable of being reformed; and where every system of repressive measures is, from the outset, doomed to fail, punishment means the infliction of so much pain by which no useful purpose is served. I cannot allow the statement of fact by which this argument is supported to pass unchallenged. The educational value of punishment is pointed out by Bain ("Mental and Moral Science." London, 1868, p. 404), where he says: "Was ever human being educated to the sense of right and wrong without the dread of pain accompanying forbidden actions? It may be affirmed with safety that punishment and retribution, in some form, is one-half of the motive power to virtue in the very best of human beings, while it is more than

three-fourths in the mass of mankind." And though moral imbeciles are *ex hypothesi* refractory as against the ordinary methods of developing moral *sentiment*, it remains yet to be proved that the sterner educational measures taken by the State and the discipline of prison life are not successful in creating so much conscience as is necessary to restrain from criminal *acts*. Even Maudsley feels bound to concede "that apprehension of punishment does influence some of them beneficially, and that the actual infliction of punishment may do them good, and that, in some few instances at any rate, it is the best treatment which can be used." But granting that some, that many of the victims of moral insanity are not induced by the application of the sanctions of the law to mend their ways, surely reform is not the only end and object with which punishment is inflicted. Society is bound to protect itself. And if the absence of the moral sentiments is a defect in them so incorrigible that nothing, not even the actual administration of legal chastisement can evoke them, ought not the State to make up for it by causing the fear of pain to be constantly before them?

Unable to entertain emotions of a higher order, these individuals, it is constantly repeated, are forced to fall back on notions of utility and perniciousness as their only guides, and cannot, therefore, well help going wrong. The proposition that a utilitarian calculation should be so absolutely antagonistic to and incompatible with rectitude of conduct, must sound very strange in the ears of the followers of a Paley, a Bentham, a Mill, and an Austin, to whom pleasure and pain is nothing less than an index to the Divine commands. But not feeling inclined to enter into speculations belonging to the field of moral philosophy, I shall content myself with stating the practical and incontestable fact that the threat of the law, supplying a motive of an eminently utilitarian character, cannot fail to enter largely into the reckoning of those to whom nothing but advantage and disadvantage will appeal. "All the responsibility which they are capable of feeling is that which springs from a fear of punishment." (Maudsley.) I cannot perceive what else

should be required in order to impute to such persons the crimes they commit? The influences which restrain the ordinary citizen from doing wrong are obviously of three kinds: religious, moral, legal. Now where disease has destroyed two out of these three classes of checks, is it reasonable, by securing those individuals impunity, to remove the last barrier that stands between them and the safety of society? Going through life without that great monitor, conscience, persons so constituted are left to the control of their appetites and passions alone, unless curbed by the iron hand of the law. "The power which their evil propensities have over their will, strengthens the reason which society has to fear them, and ought to make it shrink from not holding them fully responsible." (Carrara.) Their power of resistance being weakened, the impulsive side of their nature exaggerated, their temptations to commit evil deeds are a hundred-fold stronger than those of normal beings, and "the greater the temptation the greater should be the punishment," says Bentham. We may, then, well hesitate to answer in the affirmative the question whether persons suffering from a loss of the moral sense should be exempted from criminal responsibility, and repeat the question of the ingenious writer in the *Spectator* (January 31, 1872): "Should the law not direct its threat against him who stands so much in need of it, who, unless fortified by it, is so likely to go wrong?"

CHAPTER XII.

PARTIAL INSANITY.

"Neque enim omnes facultates simul affici, non medicorum modo ac philosophorum sententia est, sed doctorum omnium."

P. Zacchiae Quaestiones med.-leg. ii. 1, 3.

"Fuit haud ignobilis Argis,
Qui se credebat miros audire tragoedos,
In vacuo laetus sessor plausorque theatro;
Caetera qui vitae servaret munia recto
More; bonus sane vicinus, amabilis hospes,
Comis in uxorem, posset qui ignoscere servis,
Et signo laeso non insanire lagenae;
Posset qui rupem et puteum vitare patentem."

Horace, Epistles, ii. 2, 128 *seq.*

"Quest' è tal punto
Che più savio di te già fece errante;
Sì che per sua dottrina fe disgiunto
Dall' anima il possibile intelletto."

Dante, Purgatorio, xxv. 62 *seq.*

Sir Matthew Hale distinguishes total from partial insanity, and tells us: "Partial is either in respect to things 'quoad hoc vel illud insanire,' or else it is partial in respect to degrees." The teachings of the French school of alienists have enriched the psychiatrical vocabulary by the term 'folie raisonnante,' and thereby introduced into medical jurisprudence a fresh notion of partial insanity, so that the latter term is now used, not as in Hale's time with merely two, but with three distinct meanings:

(1) As opposed to total insanity, it refers to the degree of the disorder:

(2) As opposed to general insanity, it is applied to those forms of disease in which only one of the mental faculties is affected, the other functions of the mind being discharged in a

healthy, normal way: where either the emotions and the will are at fault, the reasoning powers escaping: 'emotional or affective insanity,' or, conversely where the intellect is deranged without any alteration in the sphere of sentiment: 'intellectual insanity':

(3) In a still narrower sense, the expression is used to denote those cases of (intellectual) insanity, where an isolated delusion is the only manifestation of mental disease: here not only the affective side of the mind is in working order, but the reasoning powers themselves, outside the limited range of a single defect, remain intact.

Now not only are there degrees of insanity, but everything here is a question of degree. The lunatic of the popular fancy who cannot reason, or who cannot arrive at a correct conclusion on any subject, or who cannot, in any circumstances, act rationally, is represented but by a very few specimens even within the walls of the ordinary lunatic asylum. And though Erskine goes too far if he says, in Hadfield's trial, that no madman answering Justice Tracey's description of one totally insane has ever existed in the world, so few are the lunatics coming up to that standard that we may safely assert that partial insanity in the first of its three senses is the rule rather than the exception.

I cannot better introduce the train of thoughts which underlies the conception of that partial insanity which owes its origin to French doctrine, than by quoting the words of Cockburn, C.J., in *Banks* v. *Goodfellow*: "Every one must be conscious that the faculties and functions of the mind are various and distinct as are the powers and functions of the physical organisation. The instincts, the affections, the passions, the moral sense, perceptions, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease, and the experience of insanity in its various forms teach us that while on the one hand all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of a raving maniac, one or more

only of those faculties or functions may be disordered, while the rest are left unimpaired and undisturbed." The learned Chief Justice, in thus enumerating nine independent faculties which may, perhaps, be intended by him to serve merely as examples, has carried the analysis of the human soul farther than any medico-legal author with whose writings I am acquainted. But it is only on such a theory of the human mind as being an aggregate of powers which may be divided and subdivided *ad libitum*, yet each subdivision remaining a faculty self-sufficient and independent of every other, that the hypothesis of monomania, the assumption of a form of disease of which a tendency to kill, to burn, to steal is the only symptom, ceases to bear on the face of it the stamp of inherent improbability and palpable absurdity. Most advocates of the lucid insanity are contented with asserting the existence of three independent faculties which they call intellectual, emotional, and volitional, whilst others again reduce the number to two by declaring volition to be but a result of the exercise of the first two. Each of these faculties, it is thought, exhibits its functional activity within its own sphere, without being interfered with by, or subject to the control of, any other mental power; and each may be singly attacked by disease, when the range of disorder will remain restricted to those manifestations of mental life which are under its specific sway, whilst no inconvenience of any sort results therefrom to the rest of the mind. As against this conception of the soul as a ship composed of so many watertight compartments, modern psychology insists upon the proposition that the mind is a unit. If, for the convenience of study, ideation is distinguished from emotion, feeling from will, it must not be assumed that they are so many separate entities: they are merely different aspects from which the mind and its manifestations may be regarded. The relation in which they stand to each other, psychology, in the present state of knowledge, is unable to explain. Whether the will is merely the product of intellectual and emotional processes, or whether "it is a vessel unable to fill itself, but

able to empty its contents into the material world, reason alone being capable of giving it its contents," or whether the will is an autocrat and competent, by its own free determination, to change the course of ideas, dictatorially to prescribe to thought its object, to arrest an impulse before it is transformed into action, this is a problem which still awaits solution. Neither do we know whether morality is one of man's talents, "a definite psychiatric property," entirely independent of the intellect, or merely the highest evolutional phase of reasoning power or a compound of thought and feeling. But, however that may be, so much is certain: that the soul cannot be dissected up into a number of isolated powers, and that the mind is not merely a mosaic composed of such fragments. Mind is a living and harmonious whole, each part of which receives support from every other and is bound up with all others by ties of the most intimate solidarity. It cannot, therefore, be admitted that any one of the divers faculties can receive a hurt, without the equilibrium of the whole system being disturbed. On the contrary, so close is their connection, so great their mutual interdependence, that when any one of them is injured, the shock is felt in the most distant regions of the mind. Those whose apparent psychical disturbance is limited within a narrow field, always exhibit evidence of other and wider ranges of mental malady: "Non sentiunt, non agunt, non ratiocinantur ut ceterae sanae mentis personae." Insanity limited to the sphere of the will, of the emotions, of the impulses, of the moral sentiments, or to any other single faculty, and partial insanity as meaning a disorder thus circumscribed, is but a creation of the brains of certain medical theorisers and is not, according to modern science, ever met with in the experience of practical mental pathology.

The psychological microtome has not, however, even here stopped its operations. Penetrating into the field of intellect, it has cut up the reasoning powers into minute sections, and so well has it done its work that it seemed no longer incredible that a man might believe himself transformed into a dog, a

wolf, a candlestick, or raised to the position of secretary to the moon, and yet be sane in all other respects.

> "Unnumbered throngs on every side are seen
> Of bodies changed to various forms by spleen.
> Here living teapots stand, one arm held out,
> One bent; the handle this, and that the spout.
> A pipkin there like Homer's tripod walks;
> Here sighs a jar, and there a goosepie talks."

Pope treats us here to a few typical specimens of what Esquirol has called intellectual monomania. The compatibility of isolated delusions with a mental life in every other respect healthy, was, indeed, believed and asserted long before the distinguished French alienist thus labelled the condition. Old Zacchia already tells us in his Quaestiones (II. 1. 3): "Animadvertendum est non omnes dementes circa omnia errare; quosdam enim circa omnia, quosdam circa plura, alios vero circa pauca quaedam solummodo errare constat; imo ex illis nonnulli sunt, qui in nulla re, si unam tantum excipias, errant, sed omnia prudenter, vel ut ex natura illis mos est, operantur; sunt enim qui sine capite esse ac vivere se credunt, in hoc uno male ratiocinantes, in reliquis non ita. Sic et alii qui se mortuos omnino putant, aut in aves, aut in bestias transformatos; non secus etiam ille qui in apice digiti mundum se gerere persuasum habebat, quem si tantillum moveret, mundum exiturum credebat." But with the speculations of the French school, and as a counterpart to its newly discovered instinctive monomania, this form of insanity was brought into prominence and attracted an amount of attention which it had never commanded before. And whilst since Hale's time it was an acknowledged maxim of our law that partial insanity afforded no excuse for crime, Mr. A. Cockburn, Q.C., who had imbibed the recent teachings of contemporaneous French psycho-pathology, boldly advanced intellectual monomania as a defence in MacNaghten's trial, and he did it with such discretion and skill that judge and jury alike swallowed the bait and MacNaghten was acquitted. Finally, in answering the questions submitted to them by the lords, the

judges gave full effect to that novel piece of bar-made law; for their answer to question IV. clearly lays down the principle which, in the wording of sect. 22 of the Criminal Code Bill wherein it is embodied, may be stated as follows: "A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of some state of things, which, if it existed, would justify or excuse his act." And the criminal law of England and of those colonies, such as Canada and New Zealand, which have since copied this provision in their penal codes, can claim the proud distinction of being the only system in which intellectual monomania has become crystallised and perpetuated. But how rapidly and how deeply this psychological notion has struck root in our own law, may be gathered from the fact that its legal godfather who had meanwhile become Chief Justice Cockburn, succeeded in engrafting it upon the law of testamentary capacity, by his decision in the well-known case of *Banks* v. *Goodfellow*, where he said: "While the mind may be overpowered by delusions which utterly demoralise and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there are often, on the other hand, delusions which, though the offspring of mental disease, leave the individual in all other respects rational and capable of transacting the ordinary affairs, and fulfilling the duties and obligations incidental to the various relations of life." The theory of Esquirol and of the English law then is that an isolated delusion lies imbedded, like a foreign body, in a brain which is and remains normal all around. As against this view, modern science endorses the simile of Jules Falret, who likens a delusion to a parasitic plant "which will not spring up and grow in an unsuitable soil, and the soil which is suited to it is insanity; let the soil be changed to one of sanity," rightly remarks Maudsley, "in other words, let the mind apart from the delusion be sound, and this will dwindle and die." Maine well echoes the modern doctrine if he says: "The delusion is the outward and visible sign of

disease of the brain; but the disease must have preceded the delusion, and continues silently to vitiate the mind, sapping the reason, warping the intelligence, and perverting the emotions." Let those who appear rational on every subject but one undergo an examination at the hands of an alienist expert, and there will always be found, outside the recognised circle of morbid ideas, signs and symptoms of disorder of the intellectual and moral functions, of those of sensation and of emotion, sometimes even in the bodily sphere, in short, evidence and ample evidence of a complete alteration of the psychical individuality, of a general alienation apart from the particular delusion. It is interesting to note that, a very few years after the decision in MacNaghten's case, Lord Brougham gave expression to the most up-to-day learning, in the (testamentary) case of *Waring* v. *Waring* (1848): "We must keep always in view that which the inaccuracy of ordinary language inclines us to forget: that mind is one and indivisible. We cannot, therefore, in any correctness of language, speak of general and partial insanity. If the being or essence which we term the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is quite erroneous to suppose such a mind really sound upon other subjects. It is only sound in appearance. It is as absurd to speak of this as a really sound mind (or a mind sound when the subject of the delusion is not presented), as it would be to say that a person had not the gout, because his attention being diverted from the pain by some more powerful emotion by which the person was affected, he, for the moment, was unconscious of his visitation. But the malady is there, and as the mind is one and the same, it is really diseased, while apparently sound." Indeed, one would have thought that a very simple argument ought to have sufficed to show that, however narrow the limits within which insanity may appear to move, the intelligence is nevertheless *in toto* obscured. The characteristic of a delusion is not the falsehood of the notion which constitutes it; erroneous beliefs are entertained and cherished by people in the bloom of mental health. What

distinguishes delusion from error is its persistence in spite of the plainest evidence that it is obviously wrong. Now, if the reasoning powers outside the isolated blind spot were intact, the patient would see the palpable absurdity of his morbid conceptions as soon as it was pointed out to him and, even without any outside assistance, he would, with the aid of those faculties which remain sound, correct them and in either case give them up; in other words, he would not be mad. The mere continued existence of a single delusion, whatever its subject or its character, therefore shows that the entire mind is diseased. To admit the coexistence of a sound and an unsound mind in the same individual is "as inconsistent with practical observation as it is with sound psychology;" and Stephen's dictum: "Such a state of things as madness consisting in a mere mistake caused by disease and extending no further is certainly imaginable" is at once converted into a truth of science by the interposition of the three letters 'n o t' between the words 'certainly' and 'imaginable.'

The doctrine of partial insanity being untenable, the objections so far raised might be met and the provision of the English law as to specific delusions might yet be saved, by obliterating the unfortunate words: "but in other respects sane," so that the clause would read: "A person labouring under specific delusions shall not (therefore) be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of some state of things, which, if it existed, would justify or excuse his act." The insertion of the word 'therefore' would be necessary, since it would otherwise seem to follow that a madman labouring under delusions could not rely on the more general ground of immunity, viz. absence of knowledge of the nature and quality of his act or of the capacity to distinguish right and wrong. Perhaps it would be better to alter the wording of the clause in such manner: "Specific delusions shall not entitle a prisoner to an acquittal on the ground of insanity unless. . . ." Let us now examine this legal provision in its amended form. It is remarkable that

an identical test has been proposed, as the general criterion by which to determine the responsibility of insane persons in respect of their criminal acts, by a scientific writer, namely, by Hoffbauer, who suggested that "the dominant impression in which their delusion exists, should be regarded not as an error, but as truth; in other words, their actions ought to be considered as if they had been committed under the circumstances under which the individual believed himself to act. If the imaginary circumstances make no change as to the imputability of the crime, then they ought to have no effect on the case under consideration; if they lessen or destroy culpability, they ought to have that effect in the supposed instance." The prisoner is in fact treated as a sane person under a mistake of fact, insanity having no other effect than that of making the mistake itself innocent, and making it innocent but in that limited sense, that it entitles the accused to the special verdict 'guilty, but insane,' not to a general acquittal as he would be if the mistake were reasonable. This method of dealing with lunatics is in truth nothing else but the practical application of Locke's definition of a madman as being "one who reasons correctly from false premises:" the assumption lying at its root is this, that a madman reasons and acts logically from the false premises of his delusion. Now, the doctrine of partial insanity once admitted, there is no further absurdity in the postulate that the lunatic is obliged to bring to bear those reasoning powers which are left intact, upon the subject-matter of his delusion. But since we have shown that that monstrosity, half man, half unthinking brute, does not and cannot exist, that an apparently isolated delusion infects the whole of the mind and "drains into itself the energy and vitality of all the mental processes," it is no longer permissible to use the sound mind in order to explain the movements of the unsound mind, or to expect, as Maudsley puts it, a lunatic to be reasonable in his unreason, sane in his insanity. Had it not been for the belief in the real existence of a partial insanity, for the ancient rule that partial insanity does not exempt from responsibility,

and for the desire to find a loophole by which to escape from the narrowness of the law, as thus understood, it would probably have never seemed necessary to introduce a maxim applicable to the case of specific delusions. And since modern psychiatry has removed that stumbling block, we can very well do without that maxim. For the prisoner who would escape under it, might in most cases quite as well rely on the more general ground of excuse that he was "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that he did not know he was doing what was wrong." To take two time-honoured examples: A. kills B. under the specific delusion that he is breaking a jar; surely A. does not know the nature and quality of his act. C., under the influence of the specific delusion, supposes D. to be in the act of attempting to take his life away, and kills D.: surely C. did not know he was doing wrong; he believed he was merely exercising his legitimate right of self-defence. Cases are indeed imaginable where acts would be dispunishable under a strict application of the rule relating to specific delusions, whilst punishable under the general principle. Let us take three lunatics, E., F., and G., and let each of them commit a murder under identical circumstances, each well knowing what he was doing, and that that which he was doing, was murder, a crime contrary to the laws of God and man. Carry the equality further than that, and assume that each of the three is suffering from the same form of mental disease of the same degree and in the same stage. But E. believes himself King of Great Britain and Ireland and Defender of the Faith; F. thinks he is the Czar of all the Russias; whilst G., more modest, glories in the title of Prince of Wales. Under the general knowledge test, each of them would become the hangman's prey, whilst, under the rule relating to specific delusions, their fate would indeed be different: E. would escape because, if the state of things which he believed to exist did in fact exist, he would be protected by the maxim: 'the king can do no wrong.' So would F., under the doctrine of

extraterritoriality; whilst G. would pay dearly for not having fixed his waggon to a star of the first magnitude. I think it would be difficult to find a more striking *reductio ad absurdum* for the English rule as to specific delusions. But who are they for whose benefit the special rule has been invented? What is the mental condition of those lunatics who suffer from 'fixed delusions'? They belong, most of them, to the later and last stages of that type of disease which is called chronic delusional insanity. The storms of the more active morbid process have subsided; the conduct of the patient seems to be quite correct, his talk at first sight quite rational. Enter into a conversation with him, and you will discover before long that he who submits to wear asylum attire, who condescends quietly to clean the boots of his fellow-sufferers or to render other menial services is nothing less than a crowned head, a second redeemer, a Cromwell redivivus. In the earlier stages of his disease, he not merely claimed to be a sovereign, but he acted the sovereign to perfection, exacting the respect and the obedience which he was entitled to claim by virtue of his exalted position. But all this is now changed. Though not dethroned in his own estimation, he raises not the faintest objection when called upon by the attendant to load the dung-cart, and whilst by reason of that incongruity between his words and his acts, he is an object of derision even to the other inmates, he himself fails to see it, and if it is pointed out to him, he merely opens his eyes a little wider and meets the objection with some argument which has neither head nor tail, thus reminding us of Dr. Guy's dictum that "in the case of delusions, it is difficult to detect any action of the reasoning powers, unless it be to justify and defend the mind's foregone conclusions." It requires neither a large experience of lunatics, nor a deep insight into the mysteries of psychology, to understand and appreciate how much more enfeebled must be the intellect of him who presents this contrast between conduct and thought than of him who acts up to his delusions. The state of the man with fixed delusions "is not the restoration of the equilibrium of sanity,"

not a recovery with a mere scar; the patient has passed from more active mental disease into the condition of dementia. To expect that these individuals whose reasoning powers are so weak that they do not feel that the work of their hands belies their high-flying pretensions should be able to reason regarding the facts of their delusion as a sane person would, is an enormity equalled only by the assumption that delusions which are so far encapsuled as not to influence the patient in the ordinary conduct of his everyday life should become the determining factor when he does an act which happens to be criminal. A prisoner belonging to this class of mental disorder, who imagines himself to be the King of England and who has committed a murder ought, indeed, to be acquitted: but not because he could not have been condemned if his delusion were true—we may be quite certain that in such a patient the delusion never entered into the reckoning when he committed the act—but because his whole mind is so complete a wreck that we may safely assert that he never knew the nature and quality of his deed and never understood its criminal character.

The rule dealing with specific delusions is the weakest spot in the English law on the criminal responsibility of lunatics; and we cannot but admire the wisdom of Mr. Justice Maule who, in answering question IV., so far dissented from his colleagues, as to maintain that the general test of capacity to distinguish right from wrong ought to be applied to this as to other cases. It is a significant fact also that Sir James Stephen has omitted this rule from the statement of the law of insanity in his Digest. And, finally, those American states which have embodied the other answers of the judges in MacNaghten's case, as well as the Sudan and India, have given proof of more enlightened views on the subject of mental disease, by eliminating the subject of specific delusions altogether, whilst Sec. 53 (2) of the Criminal Code of the Gold Coast is a curious attempt at compromise between a conservative regard for insane delusions and the teachings of modern psychology. Giving a free hand to judge and jury to deal with

the subjects of insane delusions as they please, it is not, indeed, open to the various objections raised against the English method of dealing with the subject, but it entrusts the popular tribunal with an amount of discretion and reposes in it a confidence which is not, in my opinion, either justified or desirable.

CHAPTER XIII.

MITIGATION OF PUNISHMENT.

"Adsit
Regula, peccatis quae poenas irroget aequas!
Ne scutica dignum horribili sectere flagello."
Horace, Sat. I. 3, 117–19.

"Lex non exacte definit, sed arbitrio boni viri permittit."
H. Grotius.

THE reader who is anxious to learn to what a Babel of thought a single badly chosen term, badly understood, may give birth, cannot do better than embark on a study of the literature of the subject of our present inquiry. The problem, in itself simple enough, is yet surrounded with mystery and misunderstandings, ninety-nine per cent., if not the whole, of which are due to the single fact that, in addition to its many other aliases, it unfortunately glories also in that of 'partial responsibility.'

First of all, the term 'partial responsibility' has been understood, or rather misunderstood, to mean the responsibility of part of the lunatics for their crimes or of lunatics for part of their crimes; and the numerous arguments which have been brought forward by the advocates of the sweeping provision of the Code pénal against all systems of law which punish any lunatic under any circumstances and for any crime, have been advanced as objections to the doctrine under consideration. To meet them, I would have to re-write all I have said when dealing with the French law and much of what I have said elsewhere. To avoid vain repetitions, I at once pass on to the strange sense which is attached to the expression by Professor Siemerling; he obviously believes that, when partial responsibility is spoken of, it is thereby intended to

render responsible part of a madman's anatomy; for he considers as fatal to the application of this principle the physical "impossibility of locking up half of a man in prison and the other half in a lunatic asylum." Others, with a turn of mind equally odd, suppose that it is sought to partition not the lunatic, but his act, and to impute to him one half, one third, one fourth thereof; and serious attempts have been made to save the doctrine thus interpreted by holding that the crime of a madman, taken objectively, contains but a fraction of the guilt which would attach to it if committed by a person in his sound senses.

Tacitly assuming that insanity exempts from punishment, and thus begging the question, others identify lunacy and non-imputability, and are thus led to conclude that partial responsibility is the necessary correlative of partial insanity, taking the latter term in the second or third of the senses which, as I have shown in the preceding chapter, it bears; and whether partisans or opponents of the principle of partial responsibility, they agree that it must stand and fall with partial insanity. "The doctrine of partial responsibility," says Jules Falret, "is the logical outcome of the doctrine of monomania." In a similar strain writes Borri: "To admit a partial responsibility is neither scientific nor correct; where it is recognised in legislation, it is merely the echo of concessions made to science of the past, when partial insanity in the strict sense of the term, monomania, etc., was recognised." On the other hand, Ortolan declares guilt to be diminished "if, moral reason not being abolished, only the other functions of the intellect have suffered, the latter having become less bright, less prompt, less comprehensive, less clear,—or if, both reason and freedom of will being intact, the emotions have become unduly excitable, exaggerated, depraved,—or if the character has lost in strength, in steadiness, in reliability."

Again, from the conception of responsibility as an inherent quality of the human mind, either identical, or at least running in a parallel groove, with mental health, has sprung the demand

that the law should establish a full barometric scale of states of responsibility, divided into as many grades as there are degrees of insanity. *Natura non facit saltum:* from idiocy, the mental level of the unthinking brute, we ascend by imperceptible steps to imbecility, from imbecility to low mental development, thence to average intelligence, and finally to the brilliant brain and to genius. These various states passing into each other through stages of gradual transition, it is not permissible to draw sharp lines of demarcation at points arbitrarily chosen. We are forced to admit that between full responsibility on the one hand, and absolute irresponsibility on the other, there must exist a corresponding scale of degrees of diminished responsibility; or rather, as some who go farther assert, we should cease to speak of absolute responsibility and absolute irresponsibility and acknowledge, once and for all, that here arise but questions of more or less. And as there are degrees of insane obliviousness to right and wrong, degrees of self-control, degrees of insane impulse, the law ought to awake to the fact that the amount of guilt decreases in the same ratio as mental disease gains in intensity. The provisions of some of the older codes seem, indeed, to be founded on the principle of a responsibility thus graduated; *e.g.* Art. 87 of the Greek code, where it is laid down that punishment is to be reduced "in proportion to the deviation from the normal standard of responsibility proved to exist in each individual case"; and Art. 52 of the Code of Lucerne contains similar terms; but, in addition, it fixes one fourth of the ordinary penalty as the minimum below which the judge must in no case descend. As against the theory of partial responsibility, thus distorted, it has been pointed out by Jules Falret that the "phrenometer" which will penetrate into the human soul, and there determine the precise degree of mental malady, has yet to be invented. In truth, to measure all those factors which together, it is thought, constitute responsibility, one instrument would never be enough; a whole psycho-physical laboratory would be required, containing a series of apparatus yet to be constructed:

a photometer to show what quantity of light is there yet left in the midst of intellectual darkness, a dynamometer to gauge the strength of impulses, a thermometer to ascertain the heat of the passions, a rheostat enabling us to find out what resistance the diseased mind still offers to the operation of all the morbid forces. The refutation, it will be noticed, is based on the same fallacy as the argument itself, on the erroneous conception of responsibility as being a natural phenomenon, a psychological attribute of the human mind; the fact is overlooked on both sides that criminal responsibility is a pure creature of the penal law, having no independent existence at all. And whereas boundary lines are unknown in nature, law must reduce everything to fixed rule and order, and can and must, therefore, erect artificial barriers within which all its children—and responsibility and irresponsibility are members of its family—are enclosed.

Before proceeding to point out what is really meant by 'mitigation of punishment' in the case of lunatics, I will stop here to remark that the term 'partial responsibility' as well as diminished, attenuated, limited responsibility, in fact all its synonyms into the formation of which the word 'responsibility' enters, are incorrect. Criminal responsibility means liability to be convicted of or punished for crime, and such liability either exists or does not exist; there is no *tertium quid*. Diminished, attenuated responsibility has, with some laxity of thought, been explained to mean liability to a less punishment; it means nothing of the kind; logically understood, it must be taken to express a less liability to punishment, a notion which is obviously nonsensical. For since the lightest punishment is still punishment, its infliction presupposes liability, *i.e.* responsibility; in other words, the question of responsibility must be answered in the affirmative before that of mitigation of punishment can arise at all.

It is clear that those systems of law in which insanity, without more, excuses crime, cannot with internal consistency recognise the principle of mitigation of punishment where the

culprit is of unsound mind; for where mental disease, however mild in form, however slight in degree, however faint its manifestations, entails irresponsibility, there cannot be any sufferers to be benefited by such a provision. What then is the meaning of that decision of the Cour de Cassation (June 12, 1885) by which it has sanctioned the doctrine of mitigated punishment? The solution of the puzzle is this: the decree of that supreme court does not deal with the insane at all, but gives judicial recognition to those borderland cases to the existence of which Maudsley, I think, was the first to draw attention. Sanity and insanity passing into each other by imperceptible degrees, there must be found by the side of the true lunatic whose mental disturbance admits of no doubt and is comparatively easy to demonstrate, a number of individuals whose mental condition excites suspicion, but whom it is, nevertheless, impossible to class among the insane. The conventional term *demi-fous* has been applied to them and it has been understood to designate a category of people comprising degenerates, those descended from a neuropathic stock, the backward, neurotics, such as epileptics, hysterical females, those in whom the chronic abuse of alcohol or a drug habit has enfeebled the functions of the brain, women whose mental equilibrium is somewhat disturbed owing to the incidents of sexual life, those convalescent from fevers, from the effects of poison or of traumatism, those who have entered upon their second childhood, in one word all those whose mental state, though not sufficiently and grossly deranged to pronounce them insane, is yet characterised by pathological changes, congenital or acquired, that lead to an exaggeration of the force of immoral impulses, diminish the powers of resistance, give rise to desires and passions of inordinate strength, interfere with judgment and discretion, and thus place such individuals in a position unfavourable to resisting the solicitations which urge them on to the commission of unlawful acts. Confronted with this motley crowd the members of which the conscientious alienist would equally hesitate to declare sane or to proclaim insane,

forensic medicine, to save the expert from an embarrassing choice, has constructed a sort of neutral territory between health and disease, has allotted it to the *demi-fou* as his dwelling-place, and has, in the name of justice, claimed the recognition of a criminal 'semi-responsibility' for the benefit of the inhabitants of that 'intermediate zone.' In formulating this demand, medicine has openly acknowledged the limits to the plenitude of its own power, and it was always well understood, both by physicians and lawyers, that the admission of the principle of mitigation of punishment in these borderland cases was merely a concession made to the imperfections of mental medicine—a merely temporary makeshift it was hoped. For it was thought that with every advance of science it would become possible clearly to determine the mental constitution of classes of people about whom the alienist is now in doubt, so that the frontier-zone will become narrower and narrower and finally disappear when, with the progress of psychiatric knowledge, the expert will be able definitely to assert or as definitely to exclude anomaly in the functions of every brain which is submitted to his investigation. Here it is worth noting the very recent publication of Grasset who, as against the current views, has attempted to prove scientifically that the *demi-fous* are not a mere expedient invented by legal medicine, but form a real pathological entity, a well-characterised group of individuals who are never, not even temporarily, out of their minds, but are permanently out of harmony with their surroundings. If psychopathology adopts the results of Grasset's studies and if legislation deems it necessary to take notice of these subjects, 'semi-responsibility' will be a lasting institution even in the countries of the Code pénal.

The question of mitigation of punishment presents itself under a different aspect in those systems of law in which insanity does not confer immunity unless it either reaches a certain degree of intensity or is of such a character as to satisfy some independent legal test. Here all prisoners, avowedly insane, who do not come up to the law's standard of irresponsibility,

are taken to account for their crimes; but whilst insisting that some punishment should be awarded, a good many countries have treated them with special favour by inserting in their codes provisions that people of unsound mind should, in no circumstance, be made to feel the full severity of the law, but have a less, a lighter, a milder, a modified punishment inflicted upon them. A very great deal may, at any rate in theory, be said in favour of the method of thus gently dealing with every madman. Every act, it has been argued, by whomsoever done, is the result partly of external stimuli and partly of the mode in which the mind reacts upon them. Most systems of law ordain that, in some cases at least, the nature of the external stimuli is to be taken into consideration in awarding punishment; it is manifestly unjust if the second ingredient, the mental element, should not be allowed to have a similar effect. Now the lunatic may know right from wrong, but "he knows it with an insane, not a sane mind"; he may know that the act he does is wrong, but "he rarely knows how wrong it is"; he may be fully aware, in theory, of the heinousness of a crime, but "in the special circumstances of his own case he regards it merely as a technical illegality." Moreover, "the insane are more prone to impulsive actions than the sane; by the very fact of their insanity, whatever form it may assume, their self-control is weakened, their higher nature is to some extent removed, and they are less able than are sane persons to forego the immediate indulgence of desire." Though a lunatic may be able to regulate his conduct according to the law, yet in most cases that conformity requires such an extra-ordinary effort that the disease, if insufficient to exculpate him altogether, ought yet to be taken into account as a factor greatly reducing guilt. And this ought to be so even where he has apparently acted in obedience to the ordinary passions of human nature; for what in the sane mind is controllable passion, becomes in the insane mad impulse which the will, simultaneously weakened by disease, has greater difficulty in restraining. "To say of such a person that he has no power

of control, or to say of him that he has the same power of control as a sane person, would be equally untrue." Punishment, therefore, though justifiable, ought not to be as heavy as in the case of the ordinary offender. And, in general, since no madman enjoys the integrity of his mental functions, we can never be quite certain whether a crime the commission of which seems quite independent of the manifestations of disease, may not, all the same, in some hidden way, be influenced by the malady; the only safe rule, therefore, is that "whatever the form of insanity and whatever the offence, the mere existence of insanity should be a valid plea for the mitigation of the punishment of the offender." (Mercier.) This theory has, at all times, been warmly opposed by generations of German jurists, such as Feuerbach, Mittermaier, Geib, Schuetze, Berner, etc.; but whilst they reject the doctrine on mainly speculative grounds, weighty practical objections have of late been raised against it from the alienist camp in the same country. The recognition of the principle of mitigation of punishment must, according to their opinion, necessarily lead to an effacement of that boundary line between responsibility and irresponsibility which ought always to stand out with distinctive clearness, and which should never be veiled from the eyes of judge, jury, and expert. The introduction of the intermediate stage unduly lightens the burden of responsibility which the scientific expert ought to be made to feel to the full; it directly encourages him to be less thorough in his examination, and enables him to conceal his ignorance. Precise questions tending to elicit whether the mental state of the prisoner satisfies the legal test of irresponsibility, ought to be put and answers as precise should always be exacted. Where the expert is unable to give them, where, in spite of great knowledge and experience and after a most conscientious examination, a doubt still lingers in his mind, it is preferable that he should declare: "Non liquet," and leave the matter in the hands of judge and jury, rather than by the creation of hybrid conditions to obscure the true issue. Thus reasons

Mendel with a frankness born of wide learning and vast experience; and he is supported in his attack by Grashey, who holds that the creation of a particular class the members of which, whilst being held responsible, are shown special clemency, is an expedient doomed to lead to faulty results whenever applied in practice; for either a prisoner who is responsible, receives too light a punishment, or one is condemned who ought to escape altogether. In my opinion, the weak spot of the system lies in the want of a definition of the term 'insanity'; it cannot be desirable that a prisoner should obtain even a merely partial privilege under the plea of insanity on the mere *ipse dixit* of a medical man, or that a jury should be able, by bringing in such verdict, to force the judge to pass on a prisoner with whom they happen to sympathise, a lighter sentence than he deserves. In fact all the objections which may be raised against the French system, equally apply here, though, I confess, in a less degree.

The technical means by which the codes of those countries where the principle of mitigation of punishment is adopted have given effect to it, are of two kinds: in the majority of them, it forms the subject of special provisions; in others, insanity not satisfying the law's standard of irresponsibility is merely enumerated among the 'extenuating circumstances.' To the latter category must be reckoned the Russian code, the text of which is silent, but the 'motives' to which specify insanity as falling under the general clause under which extenuating circumstances may be awarded. Now the difference between these two modes of dealing with the subject is not a merely formal one. For whereas the protection afforded by the recognition of the principle of the diminished responsibility of lunatics, as it is usually termed, is co-extensive with the penal code, the benefit of extenuating circumstances is of course restricted to those crimes in which the law admits or at least does not expressly exclude them; and every code contains a number of crimes, usually the most heinous ones, in which the jury is precluded from finding extenuation.

The position of the English law is unique in so far as extenuating circumstances are unknown to it. Of course, insanity may tend to rebut the existence of a specific intention where such intent forms an element of the *corpus delicti;* and so far, the jury can by its verdict find a mitigating influence of mental disorder. But outside this limited range, it has no means at hand to give voice to its conviction that the prisoner is deserving of milder punishment than is usually awarded for the crime of which he is found guilty, other than by recommending him to the mercy of the court; and though the judge will give effect to such recommendation when he considers it well-founded, he is at perfect liberty to disregard it. Some authorities look upon this as a grave defect of our law, and Sir James Stephen apparently shares this opinion since he suggests that, when madness is proved, the jury should be allowed to return any one of three verdicts: guilty;—guilty, but the prisoner's power of self-control was diminished by insanity;—not guilty on the ground of insanity. Considering that our judges do in fact, when passing sentence, take into account all the circumstances of the case and that, the mental condition of the prisoner being certainly not the most unimportant among them, they can make full allowance for it and apportion the punishment to the degree of criminality, the practical novelty in the proposal appears to me to be this, that it would to a certain extent curtail the judge's discretion by partly transferring it to the jury, and that it would introduce a precedent likely to be copied in other cases, thus tending to revolutionise our procedure and practice. Whether this change is desirable, must depend upon the view we take of the popular tribunal. I, for one, seeing that the judgments of our courts are neither less humane nor more severe than those passed in many countries where extenuating circumstances are provided for, cannot express an unqualified assent to the proposal. We must never forget that our criminal law contrasts favourably with all other systems in that the minimum punishments have long since been abolished by statute. The latitude accorded to

the judge being thus practically unlimited, the want of elasticity of the verdicts of the jury would probably never have made itself felt, were it not for the fact that there are a few felonies for which sentence of death *must* be passed. But since it is almost only in capital cases that the defence of insanity is set up, though it is applicable to all criminal charges, our problem cannot well be answered on general principles, but must be studied with specific reference to murder, this being the only capital crime of practical importance in relation to the law of insanity. Murder trials have been the field upon which almost all the pitched battles between the members of the medical and legal professions have been fought; forensic medicine has concentrated almost all its energies into the single postulate that the punishment of death should never be inflicted upon an insane person: "Abolish capital punishment, and the dispute between lawyers and doctors ceases to be of practical importance," says Maudsley, and Stephen himself seems to have drawn his inspiration from this source and to have been animated by the one desire to remove this bone of contention, when he formulated the demand that the jury should be allowed to bring in an intermediate verdict. "But if the jury qualified their verdict in the manner suggested in respect of any offender, I think he should be sentenced, if the case were murder, to penal servitude for life, or not less than say fourteen years, and *in cases not capital to any punishment which might be inflicted upon any sane man.*" I think the very limited and one-sided operation which he would permit the qualified verdict to have, clearly indicates what was the object of the learned judge in suggesting its introduction. Whilst not merely appreciating, but fully sharing, the feeling of the medical profession that a *bonâ fide* lunatic should never pay the extreme penalty of the law, I doubt the wisdom of introducing an entirely novel principle into our law of insanity just for the sake of being able to apply it in one single instance, however pre-eminent the place which such isolated application could claim in practice. I should the more hesitate because the one crime

which the law in its present state is incompetent adequately to deal with, is altogether the most vulnerable part in our penal system. The English law of murder is out of harmony with the spirit of the age and avowedly stands in urgent need of reform; the malice aforethought underlying it is a hotchpot of heterogeneous states of mind, and the whole subject abounds in curious learning, technical reasoning, and artificial constructions to such a degree as to shock common sense. When this defect has once been removed and a classification of culpable homicide is introduced both logical and conforming to modern moral notions, the mental ingredient in the capital offence may well be such that no genuinely insane person could ever be found guilty of it. At any rate, the revolutionist in the law of lunacy ought to stay his hand until the reformer in the narrower field of murder has done his work. That, meanwhile, no practical harm results from an expectant attitude, is plain since even those most dissatisfied with the existing rules feel bound to admit that "it is long since an undoubted lunatic was hanged."

CHAPTER XIV.

THE CRITICAL MOMENT.

"Χρόνῳ τὰ πάντα κρίνεται."

It now remains to ascertain the exact moment at which the accused person must be insane and satisfy the legal test of irresponsibility, if any, before he can claim an acquittal. Almost all the codes content themselves with declaring 'the time of the act' or 'the time of doing the act' as the critical epoch; and it must be conceded that in a large number of criminal trials this provision will be found precise enough for all practical purposes. For the interval between the time when the idea of committing the offence is first conceived and its final execution has often to be reckoned by mere seconds, and does not, in the ordinary run of cases, exceed a few weeks. Considering that insanity generally runs a very protracted course, and that even most of what are called acute attacks last weeks and months, we are, in the absence of cogent proof to the contrary, not merely entitled, but forced to draw the inference that a prisoner shown to have been deprived, by mental disease, of the faculty of discerning between right and wrong on the 1st of March, was probably in the same state of blissful ignorance both on the 1st of February and on that day dedicated to him and to all his fellow-fools. But instances are by no means unknown in the experience of the tribunals where many months, maybe a year or two, elapse between the time the crime is first resolved upon and its ultimate consummation, and where the series of acts, collectively constituting the offence, is spread over a very prolonged period. In such cases it may well be possible accurately to determine that the prisoner was in full possession of his mental faculties at the time when he

took one step, but a hopeless mental wreck at the time he took another. Must he have been mad from first to last in order to escape punishment? Or will he be excused if he came up to the legal standard of immunity at any time at which he performed any act which is part and parcel of the crime? Let us illustrate the problem by a few examples. A. is accused of making counterfeit coin; the evidence clearly establishes that he was in normal mental health both when he first planned the crime and when, in the execution of such plan, he procured dies for the purpose, but a lunatic, and quite ignorant of the nature of his act when he actually manufactured bad money. After the decision in Roberts's case there is no doubt that he could be convicted of an attempt; but is he guilty of the full offence? Again, a number of anarchists conspire to kill a foreign sovereign who is expected to visit this country at an early date; they cast lots as to which of them is to do the nefarious deed; the lot falls on B., who is proved to have been insane at the time the plot was hatched, and not then accountable for his actions. Being skilled in the manufacture of explosives, B. is also entrusted with the task of making the bomb, and he does so whilst still being a victim to mental disorder. For various reasons the visit is again and again postponed, but when it finally comes off, B., who has meanwhile recovered his reason, throws the bomb. Very few codes supply any direct answer to these questions. Among those which form the exception, I wish to draw attention first of all to that of the Hawaiian Islands, which provides in Ch. iv., Sec. 4, as follows: "Any person acting under mental derangement, rendering him incompetent to discern the nature and criminality of an act done by him, shall not be subject to punishment therefor: Provided, however, that if any such person while capable of discerning the nature and criminality of any act, entertained the intent to do the same, and subsequently does it in pursuance and execution of such intent, he shall be held responsible therefor, though the same be done in such a state of mental derangement." In other words, it is not

necessary for a conviction that the prisoner was an accountable agent at a time when the deed was consummated; it is enough if he forms the intent with the knowledge that the act contemplated is a crime. The theoretical foundation of the Hawaiian doctrine is no doubt the conception of crime as composed of a mental element and a bodily act; insanity, it is thought, cannot be material in respect of the physical act, but only as regards the psychical ingredient; and if the latter, the criminal intention, is not influenced by mental disease, lunacy subsisting at the time of the bodily act is an utterly irrelevant fact. The practical justification of this provision appears to be the inference forced upon us that if a man, whilst in a state of lunacy, carries into effect a plan formed when he was sane, the deed is *primâ facie* not a product of, but unconnected with, his mental disorder. Granting that the set of circumstances indicated does actually raise such presumption of fact, the argument by which the provision, as a rule of substantive law, is supported is utterly fallacious. The underlying psychological notions as to the nature of human actions are quite untenable. The formation of the criminal intent is looked upon as setting in motion a plant of machinery which, once started, will do its work when the time comes, without any further intervention of the human brain. Such a hypothesis, once enunciated, carries the impress of absurdity on the face of it. We all know that a resolution to do a deed, however settled, does not, without more, result in its realisation in action; in spite of all previous planning and plotting, the hand will not move without the immediate guidance and control of the mind. Now under the state of facts specified in the proviso of the Hawaiian code, at the time of actually carrying out the deed, the prisoner satisfies the legal test of non-imputability; and since the act of one who is not an accountable agent is non-existent for all legal purposes, it follows that the accused, if punished, is not punished for what he does, but for what he intends doing. Under a system of law which made criminal intention as such punishable, no objection could be raised to this mode of dealing with

one sane at the time of planning the crime, but mad when committing it. And in our own law a prisoner thus situated must in logical strictness be convicted of one crime, namely, treason by compassing and imaging the king's death, this being the only instance in English law where the design itself constitutes the offence, whilst the overt act is required merely as a matter of evidence; no doubt even this is *summum jus.* Since the general conception of crime in the Hawaiian code is identical with our own, the clause which exacts that a prisoner cannot escape under the plea of lunacy unless he comes up to the legal standard of irresponsibility at the time when forming the intent to commit the offence, is illogical, inconsistent with and repugnant to the fundamental notions of the code itself. And the same is true of the provisions of the codes of Argentine (Art. 81, 1), and of Paraguay (Art. 148), neither of which excuses a prisoner who has consummated the act whilst being in a state of confusion of the senses or of the intellect, unless he was in the same state at the time when he resolved upon the deed as well.

So much, therefore, is certain: the principle "Actus non facit reum nisi mens sit rea" means that the *mens rea* must accompany and directly result in the act. To have entertained the intent to commit a crime at some prior date is not enough to render punishable the actor who subsequently does the deed whilst labouring from a form of insanity which the law declares to excuse crime. This follows directly from the wording of the code in all those states where 'the time of the act' or 'the time of doing the act' is mentioned; for 'the time of planning the act' cannot fairly be brought under either of these descriptions.

It is obvious that where the crime consists of a series of acts which have to be done in succession, the actor cannot be convicted unless he satisfies the legal criterion of responsibility at the time of doing the last of those acts which are elements in the *corpus delicti.* Otherwise, since anything done by an irresponsible being is non-existing in the eyes of the law, one

of the essentials of the crime with which he is charged would be wanting. And this is expressly provided by the Servian code, which fixes upon 'the time of *consummating* the act.' But assuming that he was in a normal state of mental health when acting the final scene in the drama, ought he to be exempted from liability if it is proved that he suffered from a disordered brain at the moment when he first formed the intention of doing the deed or at the time when he took any of those steps which lead up to its ultimate execution? Emphatically not. The state of mind of the actor at any of these introductory or intermediate periods is quite irrelevant. For by forging the last link in the chain, he, the rational and responsible being, has adopted, ratified, and thus made his own everything previously designed and wrought by the madman.

CHAPTER XV.

CONCLUSIONS.

> "Si quid novisti rectius istis,
> Candidus imperti; si non, his utere mecum."
> Horace, Epistles, i. 6. 67–8.

HAVING passed in review the provisions of different legal systems in respect of our problem and having subjected to a detailed critical examination the main principles underlying the same, it only remains, so far as the questions of substantive law are concerned, to summarise the lessons which our investigation has taught us and to apply our conclusions to an appreciation of the English rule.

We have seen that the Chinese system is the only one which treats the criminal lunatic as an ordinary wrongdoer: a treatment of the insane which cannot be acceptable to any palate that has tasted the fruits of European civilisation. A revival of this plan among us could have no other result than serve to verify Montesquieu's well-known dictum: "L'atrocité des lois en empêche l'exécution." However, in obliterating the boundaries between insanity and crime, the oldest and most antiquated system of law and the most advanced theories of modern science—or would-be science?—meet. If the legislator of the Celestial Empire disregards the mental state of the offender, the apostles of the positive school see in every crime but a symptom of mental aberration; they teach that "the treatment of crime is but a branch of psychology," and that "true science ought to give up, once and for all, the notion of, nay the very word, responsibility." These doctrines, founded as they are upon inferences hastily drawn from facts but insufficiently investigated, are of no utility to the legislator,

and the practical criminologist must cling to the fundamental idea of responsibility and must continue to regard disease of mind merely as a ground of exemption therefrom.

The question then takes the form: Is insanity to excuse *per se*, or only *sub modo?* And if *sub modo, sub quo modo?* The French code has chosen the former alternative; but though it has found a large following among other nations, its plan of identifying mental disease and irresponsibility has here and there remained a dead letter. In practice, this provision has merely shifted the centre of gravity in the investigation of the question of guilt from judge and jury on to the medical expert; and the latter, well knowing that insanity is a very elastic term and that in the realm of mind, as in that of body, health passes into disease by imperceptible shades, could not fail to perceive the manifest absurdity of conferring immunity from punishment upon all sufferers, without reference to the form, character, or degree of their illness. Professional witnesses, therefore, took it upon themselves to answer questions directed towards the elucidation of the mental state of health of a prisoner, with the delivery of an opinion as to whether he is a fit subject for punishment, till at last the practice has sprung up of asking them not merely, in accordance with the wording of the law, whether the prisoner was mentally deranged, but, in addition, whether he is a responsible being. Since, for the solution of the latter problem, the law gives him no help or guidance, nor, of course, the court any directions, the medical expert finds himself invested with an unfettered judicial discretion in the exercise of which he pronounces the accused person responsible or irresponsible, according as to whether he thinks that, all things considered, he ought or ought not to be punished. If a system which causes life, liberty, and reputation of the subject to depend entirely upon the individual views of an individual witness, however skilled in his profession, has not been productive of a long and uninterrupted series of judicial scandals, this is largely due to the fact that the French medical experts as a class have displayed in a pre-eminent degree the

virtue of self-imposed moderation. Nor must it be forgotten that, in delivering their opinions, they have in many instances, no doubt unconsciously, but given voice to the demands of public opinion of which, moreover, in France the members of the medical profession are not only the accredited organs, but the trusted leaders. But if the public has been content to let matters remain as they are, the medical profession, somewhat forgetful of its own share in bringing about the present state of affairs, has at last revolted, in order to rid itself of a yoke which it feels unequal to bear. The resolution of the Geneva congress, "that the judges in their orders, judgments, or decrees, should adhere to the text of Art. 64 of the penal code, and should not demand of the medical expert the solution of questions which lie outside his competence," means not only the bankruptcy of medical jurisdiction; it deals the death-blow to the French system by removing the only prop by which it could be supported.

If, therefore, it becomes necessary to discriminate between lunatic and lunatic, the distinction, as we have seen, should be based upon psychological, not upon purely medico-biological, marks; and this is, indeed, the method adopted by all the more modern codes. Our comparative inquiry has taught us that legislative ingenuity has exhausted itself in the discovery of only two such tests, which, though often disguising their identity under differences of language, yet, either alone or in combination, are met with in all systems of law which have laid down any such criterion whatsoever. And be it said at once: neither analytical nor inductive jurisprudence has hitherto supplied us with any additional data for devising a third independent criterion. Nor has one iota of material therefor emanated from the medical profession which, unless contented with merely destructive criticism of this or that provision of the law, or with clamouring for the adoption of the absolutism of the French code, has wasted much energy in paraphrasing one test or the other, or a combination of both of them. Knowledge and self-control and the union of knowledge and self-control in will, *i.e.*

in the rational will of the German law, are, therefore, the objects between which we shall have to choose.

Though the proposition that the inhibitory functions of the mind are weakened in all types of insanity, nobody who has any experience of mental disorders would feel inclined to challenge, the question whether they are ever completely abolished in the sense that the patient is no longer able to exercise any influence upon his actions, and, instead of controlling them, is himself entirely controlled by what may with literal truth be called an irresistible impulse, must be considered as an open one. If the very occurrence of such impulses is a matter of doubt and dispute among those alone competent to judge, it is hardly surprising that the medical faculty is not in possession of an infallible criterion by which to distinguish between an irresistible impulse and one which is resistible though it was in the given case unresisted. In other words, an ungovernable impulse, even if it has a real and not merely a hypothetical existence, is not, for judicial purposes, a provable fact, and that which is merely an article of speculative faith with some, by no means all, members of the medical profession, ought certainly not to be made the pivot upon which the question of guilt of a lunatic prisoner turns.

If, therefore, loss of self-control is not a reliable criterion, the dual test, of which it is one member, *ipso facto* breaks down. Nor is the situation saved by hiding the dualism under the monistic formula of the German code. On the contrary, to include in a single term two utterly heterogeneous elements makes confusion but more confounded; and if that single term is freedom of will, serious judicial inquiry is replaced by dialectic battles fought on slippery metaphysical ground.

Proceeding onwards, we have extended our researches into the field of pathology of conscience. But again we were confronted with nothing but difficulties and uncertainties, and the conclusion was forced upon us that moral insanity, even if it exists as a separate psychiatric type, ought certainly not to exempt from punishment.

In the demesne of substantive law, then, the results of our investigation have been of an entirely negative character: our study of foreign systems of law has failed to disclose any rule which might with advantage, or even with safety, be substituted for our own rule. In analysing the English treatment of the subject, we have, indeed, discovered one doctrine which has no counterpart in the legislation of other nations, namely, that of partial insanity in the sense of isolated delusions. Founded, as it is, upon antiquated learning and upon a fundamental misconception of the human mind, the rule dealing with isolated delusions is as mischievous as it is unnecessary. It is a rotten branch engrafted upon the tree of knowledge, and the sooner it is lopped off the better. But apart from that morbid outgrowth, is the tree sound? Is the knowledge test able to stand the searchlight of criticism? This problem deserves the most serious consideration. For, proceeding by way of exclusion, we arrived at a spot where the knowledge test was forced upon us as a last refuge, and if it be found wanting, but one alternative remains, namely, the desperate and dangerous plan of abandoning all hope of regulating the question of criminal responsibility of lunatics by legal rule, and of giving judge and jury an absolutely free hand to deal with each individual case as it arises. Medical men have sometimes advocated the adoption of the latter method; thus Bucknill and Tuke say: "Perhaps no broad principle of general application can be laid down, nor the question be ever argued except on a concrete case." But the legal mind justly insists upon a very strong case being made out against the possibility of a legislative solution of the problem before it will adopt the standpoint of legislative nihilism, and rightly opposes the proposition that no rule at all is preferable to a rule which does not come up to the standard of absolute perfection.

The knowledge test has many detractors. Of the objections raised against it, some, as we have seen, are founded upon a complete misunderstanding of the nature and meaning of the criterion; others draw attention to imperfections necessarily

inherent to the human tribunal, whatever be the rule which is to be applied. But the argument which, if proved, would be absolutely fatal to the test, is the claim that it is not applied in practice. "It is notorious," says Maudsley, "that the acquittal or conviction of a prisoner when insanity is alleged is a matter of chance"; and Taylor endorses this statement, in a somewhat mitigated form it is true, when he writes: "Acquittal on the plea of insanity is, on some occasions, a mere matter of accident." In the opinion of the last-named author, chance seems, however, to have been operative merely in introducing an element of mercy into our courts of justice; for he himself states that "the legal test of a consciousness of right and wrong is much complained of, but in practice it cannot be said to err on the side of harshness or severity." Few persons, I think, are prepared to subscribe to the proposition that the English rule leaves everything to chance, a proposition certainly not justified by the experience of our tribunals. It is satisfactory to note that even among alienists those holding the more extreme views are losing ground, and that medical men begin to realise that under the sway of the English test "upon the whole substantial justice is done." And that is all I claim for it, and all that can, in reason, be expected of it. Exceptional cases will occur which cannot, without an undue effort of the imagination, be satisfactorily dealt with under its operation. The paranoic of the Hadley type who, in obedience to a hallucination of hearing, repeats the sacrifice of Abraham, is one example in point; the mother who, during an attack of puerperal insanity, kills her new-born babe to save it from misery or sin, is another. It is better to recognise the existence of these exceptional cases than to attempt, by means of a strained interpretation, to bring them under a rule which cannot fairly be said to cover them. Nor ought judge and jury, when dealing with such a case, *ad hoc* set aside the law in order to do moral justice to the poor prisoner in the dock. For it is an impressive spectacle, indeed, and, I think, not conducive to that respect which is due to the majesty of law "when the judge," as

Doe, J., said, in *The State* v. *Pike* (49 N. H. 399), "is forced by an impulse of humanity, as he often does, to substantially advise the jury to acquit the accused on the testimony of the experts, in violation of the test asserted by himself." Our constitution has wisely left the prerogative of mercy in the hands of the Sovereign, and cases where the administration of the law works hardship to the individual are the appropriate occasions for its exercise.

Without, therefore, claiming for the provision of the English law either theoretical perfection or a practical comprehensiveness wide enough to do complete justice in every conceivable case, I believe I am justified in maintaining that it is as safe and satisfactory a working rule as has yet been devised. And I make bold to assert that the most strenuous advocate of reform, if he but took the trouble to embark on a thorough study of the subject from every possible aspect, would before long make the startling discovery that was made by the Criminal Responsibility Committee of the Medico-psychological Association, 1894–6, the result of whose inquiries was "that the committee felt the ground for a demand for an alteration in the law was dissolving beneath their feet." But it may be asked, indeed it has been asked, whether these rules of the English law must be considered as final. By no means; law, like other human institutions, has in progressive communities an inherent tendency to progress. But its evolution in respect of the solution of our problem is dependent upon the advances of mental medicine; and whilst holding, as after my investigation I feel bound to hold, that in the present state of psychopathology the knowledge test is the safest criterion by which to gauge the liability of lunatics in criminal trials, I am fully prepared to endorse Dr. Bucknill's words when he writes: "I have no doubt that when the knowledge of insanity possessed by physicians can be shown to be complete, the law of insanity will, after more or less delay, due to professional conservatism, be brought into reasonable agreement with it." Meanwhile, however, the only safe legislative policy in regard to our problem is a strict adherence to the maxim: 'Nil temere novandum.'

CHAPTER XVI.

EVIDENCE.

"Non semper ea sunt quae videntur; decipit
Frons prima multos; rara mens intelligit
Quod interiore condidit cura angulo."
Phaedrus, Bk. IV. Prol. 5.

A SURVEY of the provisions of foreign legal systems and a critical investigation into the principles laid down by them have convinced us that, in the demesne of substantive law, the reformer who seeks to improve our law of insanity, not simply to revolutionise it, does not derive much inspiration from that source. Unless we allow our care for the individual to blind us to the demands of public safety, we must have seen that the limits within which the English rules are capable of being, and ought to be, amended, are comparatively narrow, if the administration of justice is to be guided by the positive data, and not by mere speculative hypotheses, of psychological medicine. The practical value of those maxims and the question whether substantial justice is done, depends, however, not merely on the terms of the abstract propositions in which the test is laid down, but to a very large extent upon the spirit in which it is to be applied in practice, and first and foremost upon those principles of adjective law which determine the amount of evidence necessary to establish the plea of insanity; hence the presumptions in which our law on the subject is specially rich, become of paramount importance.

"Persons *primâ facie* must be taken to be of sound mind till the contrary is shown" (Denman, C.J., in *R.* v. *Oxford*), a *presumptio legis* founded upon reason and convenience, and one

which ought not to be reversed—at any rate until Dr. Forbes Winslow's prophecy having come true and lunacy being the rule, no longer the exception, the human species has, by a new Linnæus, been rechristened *homo insipiens.* But if we proceed to inquire how much proof is necessary in order to displace that presumption, we find that in this country, though juries continue to return merciful verdicts, the law has become more exacting than it was at the beginning of the last century. Then, in Hadfield's case, Lord Kenyon told the jury: "Sanity must be made out to the satisfaction of a moral man, meeting the case with fortitude of mind, knowing he has an arduous duty to discharge; yet if the scales hang anything like even, throwing in a certain amount of mercy;" in other words, if in doubt acquit. Contrast with this the statement of the law by Sir James Mansfield in Bellingham's case (5 Car. & P. 169): "The defence must prove absolute alienation beyond all doubt," and the direction given to the jury by Rolfe, B., in *R.* v. *Stokes* (3 Car. & Kir. 188): "The onus rests on the prisoner, and the jury must be satisfied that he actually was insane. If the matter be left in doubt, it will be their duty to convict him; for every man must be presumed to be responsible for his acts till the contrary is clearly shown." In some at least of the American states the law has undergone a more liberal development. It is true in *The State* v. *Spencer* (1 Zabriskie, 202) Hornblower, C.J., went so far as to demand that "the proof of insanity to acquit should be as strong as the proof of guilt to convict," but already in 1844, Shaw, C.J., in *Commonwealth* v. *Rogers,* held that "a preponderance of evidence in favour of insanity should acquit." On the trial of Daniel E. Sickles (U.S. Court for the District of Columbia, 1859), Crawford, J., went considerably further and directed the jury in the following terms: "Everybody is presumed to be sane who is charged with a crime, but when evidence is adduced that the prisoner is insane and conflicting testimony makes a question for the jury, they are to decide it like every other matter of fact, and if they should say or conclude that there is uncertainty, that they

cannot determine whether the prisoner was or was not so insane as to protect him, how can they render a verdict that a sane person perpetrated this crime, and no other can. . . . The humane, and I will add just, doctrine that a reasonable doubt should avail a prisoner, belongs to a defence of insanity as much, in my opinion, as to any other matter of fact." And, similarly, in *The People* v. *Garbutt* (1868, 17 Mich. 9), Cooley, C.J., said: "The prosecution is at liberty to rest upon the presumption of sanity until proof of the contrary condition is given by the defence. But when any evidence is given which tends to overthrow that presumption, the jury are to examine, weigh and pass upon it with the understanding that although the initiative in presenting it is taken by the defence, the burden of proof upon this point of the case, as well as upon the others, is upon the prosecution to establish the conditions of guilt." The principles laid down by these decisions and confirmed in *The People* v. *MacCann* (16 N.Y. 58), and in *Wagner* v. *The People* (2 Keyes, 684) are then:

(1) The defence need not prove the fact of insanity up to the hilt; some slight *primâ facie* proof is often all that is required.

(2) Unless this *primâ facie* evidence is overthrown by the prosecution, or where the testimony is conflicting so as to leave the faintest doubt in the minds of the jury, they must acquit. In some of the continental countries the postulate that a doubt ought to suffice to ensure an acquittal, flows with logical necessity from the very wording of the code. Take, for instance, Paragr. 51 of the German code; as, in the case herein provided for, 'there is no punishable act,' and as, of course, only a punishable act can be punished, it follows that before any punishment can be inflicted, it must be quite clear that the provisions of Paragr. 51 do not apply. Till this is fully established, the judge, were he to award punishment, would run the risk of punishing an act which is not punishable. As long as there is a shadow of a doubt whether the case falls under Paragr. 51, it is uncertain whether a punishable act has

been committed, and as long as there is the faintest uncertainty as to whether a punishable act has been committed, no conviction can take place. The same result follows from, and the same interpretation has been put upon, the words: 'There is neither crime nor offence' in Art. 64 of the French Code pénal. But even in those foreign states where this humane doctrine does not follow as a logical corollary from the text of the law itself, the courts will yet direct an acquittal where there is the faintest doubt in the minds of the jury, and they will do so by the application, to the case of insanity, of the general principle: 'In dubio pro reo.'

Before, however, deciding whether our own courts ought to reduce that minimum of proof which they exact before they consider the plea of insanity to be established, and whether it is desirable that they should give the prisoner the benefit of the doubt where there is conflicting evidence, I must once more draw the attention of the reader to the distinction between insanity and irresponsibility upon which I have so often insisted, since I see that it is completely overlooked both in the American decisions which I have quoted, and by the commentators of foreign codes. The most perfect specimen of a confusion of those two conceptions and of the hopeless jargon to which such muddling-up must give rise, is, however, a ruling of the Supreme Court of Illinois in the case of *Fisher* v. *The People* (1863, 23 Ill. 283) where it was held that "sound mind is presumed if the accused is neither an idiot, lunatic, nor affected with insanity. If he be insane, sound mind is wanting, and the crime is not established; therefore the burden is on the State to establish sanity, and not upon the prisoner to show insanity." Though the language in which this passage is couched is probably the most obscure and unintelligible which has ever flown from the lips of a judicial oracle, yet I believe that a heart of gold lies hidden beneath this very shabby attire. This will become apparent after we have subjected the so-called presumption of sanity to a more minute examination. If it means nothing more than that

sanity is presumed in every case, it is clear that the prisoner must be convicted unless he succeeds in dislodging this presumption, and he can dislodge it in no other way than by proving insanity. The onus on this issue is upon him, and so long as the amount and the weight of the evidence is equal on both sides, he has failed in that proof. To cling to the presumption of sanity and at the same time to hold that the faintest doubt in the minds of the jury ought to induce them to acquit, is a standpoint involving an irreconcilable contradiction. The presumption of sanity, however, means more than it seems at first sight to imply. Stephen tells us in Art. 29 of his "Digest of the Criminal Law," that "everybody is presumed to be sane, and to be responsible for his acts. The burden of proving that he is irresponsible is upon the accused person." The doctrine of the English law is, in fact, this:

(1) Everybody is presumed to be sane.

(2) Everybody, even one proved to be insane, is presumed to be responsible; in other words, even the raving lunatic is presumed to come up to the law's standard of responsibility, *i.e.* to be able to distinguish right from wrong.

Or to put the matter in a different way, a prisoner who sets up the plea of insanity, has to prove:

(1) That he is of unsound mind. Having satisfactorily established this, he must show further

(2) That he fulfils that condition under which alone the law excuses a madman who has done an act otherwise criminal.

Till he has made out that he is a madman, the question whether he can claim the benefit of ignorance as to the nature and quality of his act cannot arise; for such ignorance does not excuse *per se* and every prisoner, but only one who has demonstrated to the satisfaction of the jury that he is insane. This being the law, it is quite true that the judge, if he directs the jury to disregard so much of the expert evidence as tends to show that the accused exhibits a morbid tendency to do impulsive acts, that his will is weakened by disease, that

he is prevented by mental disorder from appreciating the moral character of his acts, does actually withdraw from their consideration some of the essential facts; for though irrelevant as to the question of responsibility as such, they are of paramount importance in guiding the jury to arrive at a solution of the primary question whether the prisoner is suffering from mental disease, of which they are symptoms.

But the onus in respect of either issue lying on the accused, he must be condemned if the evidence is inconclusive on the one or other of these two questions. And here, I think, the law is out of harmony with the teachings of medical science. Nothing, indeed, can be said against the first presumption, viz. that everybody is to be taken as of sound mind till the contrary is shown, and to rebut it, very strong evidence ought, in my idea, to be exacted; considering how very elastic is the term 'insanity,' the mere opinion of a scientific expert who may be a partisan witness or a medical faddist, if unsupported by palpable facts or cogent arguments, ought certainly not to be enough to displace it. But if the law further insists that *primâ facie* a knowledge of the nature, quality, and illegality of his act should be attributed to one avowedly mad, it most decidedly runs counter to medical experience. We have seen that there is no such thing as partial insanity; "the human brain is not like a machine from which a screw may be removed here and there, without the working of the whole being thereby interfered with"; when the mind is unhinged, all the psychical faculties are disturbed, and the intellect is clouded. It cannot, therefore, be either reasonable or safe to assume that mental vision should remain clear and intact just in respect of the one act which constitutes the crime; the probability certainly lies all the other way. Hence a rule which requires that where the evidence as to the knowledge of right and wrong possessed by a prisoner who is proved to be mad, is conflicting and, *à fortiori*, where no evidence at all is forthcoming on this point, the accused must be convicted, is emphatically

harsh and not humane, and must appear so specially if we remember that the art of mental diagnostics has its limits and that a blissful ignorance sufficient to excuse him, though present all the while, may escape the alienist expert's eye. I hold accordingly that whilst the most definite proof should be required of the *existence* of mental disease, when once it has been established that the prisoner is a lunatic, the present presumption of the law should be reversed; and it ought to be laid down as a rule of evidence that those proved to be of unsound mind should be assumed, till the contrary be shown, *not* to know the nature and quality of their acts and that that which they were doing was wrong. As long as the strictest proof of mental disease is insisted upon, the risk that under the application of that rule many will escape who ought to be punished, is not too great even under our present system of procedure under which the medical witnesses are called on behalf of prosecution and defence and are therefore too often, though maybe unintentionally, to a certain extent partisans. I confess, however, that the arguments in favour of its adoption would be strengthened a thousandfold if the experts formed a permanent professional body, instructed and called, not by the parties, but by the court.

In a previous chapter, when studying the provisions of the English law, we found that the answers of the judges in MacNaghten's case have modified the rule as to the criminal responsibility of lunatics in so far as they lay down that the question of knowledge of right and wrong, instead of being put generally and *in abstracto*, should be put in reference to the particular act with which the prisoner is charged. The motive which dictated this change is too transparent and not far to seek: the primary object which the judges had in view was to bring the sufferer from 'partial delusions,' but not in other respects insane, under the protecting aegis of the plea of insanity. Such a one, *ex hypothesi*, could distinguish right and wrong *in abstracto;* and if he was to derive any benefit from the knowledge test at all, the problem must in his case be answered with

regard to the specific act charged as criminal. Partly for the sake of *elegantia juris*, but chiefly with the purpose of more easily insinuating into our law and of rendering more palatable the innovation which the exemption of a person partially insane certainly constituted, they brought the wider rule into harmony with the freshly constructed narrower one, and prescribed that the prisoner's knowledge in respect of the act imputed to him should decide his fate. And as a matter of substantive law this reform has certainly everything in its favour; for it does not matter an iota whether the accused has or has not the power of appreciating the character of nine hundred and ninety-nine deeds which he has not committed, as long as he did know that he was doing wrong when he did the one act with which he is charged. But the alteration made in the law by Mac-Naghten's case had the additional effect of placing new and formidable obstacles in the way of substantiating the defence of insanity; and I do not for a minute believe that the judges did foresee, or that they would have considered as desirable, if they had foreseen, the increased difficulty of proof which was the collateral consequence of the modification they made in the law. The whole trend of our law of insanity, throughout all its stages of development, has been towards greater leniency and humanity; but here we are undeniably confronted with a retrogressive phenomenon. Before that momentous case, it was enough to show that the accused was deprived of the faculty of distinguishing right and wrong in general; but now he must be convicted, though he can be shown not to know right from wrong either *in abstracto* or in respect of a thousand other acts, *if it cannot be positively proved* that his ignorance extended to the very act of which he is accused. In practice the evil is not so great as it appears in theory; for, unconcerned about all presumptions of law, the medical expert will rely on the presumption of fact that a madman who does not know right from wrong *in abstracto*, or *in concreto* with regard to a large number of other possible acts, does not all at once emerge from darkness into light when contemplating and doing the deed for which he

stands in the dock; and in such a case no expert will hesitate in his testimony to negative the question of knowledge with specific reference to the act charged as a crime. In this connection, it is interesting to study the history of Paragr. 51 of the German code and of the corresponding article in the draft code of the North German Confederacy during its passage through the Reichstag, and to trace the painful efforts there made to obviate the very result which the answers of the judges in MacNaghten's case have brought about in our own law. The original wording of the German paragraph in question was identical with the present one, which runs: "There is no punishable act if the actor at the time of doing the act was in a state of unconsciousness or of morbid disturbance of the mental faculties which excluded the free determination of his will." At the suggestion of the medical faculty of the University of Leipzig the paragraph was, in the course of the second reading, amended by the insertion after 'which excluded the free determination of his will' of the words: 'in respect of such act.' The object of this addition was not by any means to render more difficult the proof of irresponsibility, but, on the contrary, the article was so amended because the faculty had pointed out "that the actor might, at the time of doing the act, be capable of freely determining his will in many directions, and yet the specific act which forms the subject of judicial inquiry might not be the product of a free determination of his will." The 'motives' (p. 71) make it clear that the sole intention of the Legislature, in inserting those five words, was to ensure that full justice should be done in such cases: "There can be no harm in thus referring specifically to the act in question, since obviously the object of such reference is to make it quite clear that proof of want of free will need be given only with regard to the act which forms the subject of the charge, and that it is unnecessary to show that freedom of will was excluded in other respects. The question of medical science whether there can be such a thing as partial insanity is not thereby prejudiced. If the expert testifies in a particular

instance that the delusion of the actor, though standing in no direct causal relationship to the act itself and to the purpose of such act, indicates that the intellect of the actor as a whole is obscured to such an extent that he cannot be considered as sane outside the field of such delusion, it is thereby established that the actor was incapable of freely determining his will in respect of the act charged as criminal, as well." The amendment was, however, much attacked by medical authorities on the ground that the added words too easily lend themselves to misconstruction, and that the new wording of the passage might well be interpreted to mean that lunatics were to be held responsible if it were impossible to prove that freedom of will was excluded in respect of the very act *sub judice.* In the course of the third reading, the Reichstag, therefore, deleted the concluding words of the paragraph and restored its original form. And the result is, that though all the law cares about is whether the prisoner was a free agent in respect of *this very act*, the question must, even in the absence of evidence connecting the specific act with the disease, be answered in the negative if, at the time of doing the act, the actor was suffering from such mental derangement as excludes, according to the experience of medical practice and according to the teachings of medical science, the free determination of the will in general (*cf.* "Shorthand Reports of the Transactions of the Reichstag of the N. G. Conf., First legislative period, Session 1870," vol. i. pp. 233 and 1147 *seq.*). In my opinion, if our law is not prepared to go the whole length of presuming ignorance as to right and wrong in every accused person who is proved to be mad, the wheel, so far as the question of evidence is concerned, ought at least to be turned back to that point where it stood before MacNaghten's case. A delusion may remain hidden, and so be overlooked, though it has actually affected the conduct. Again, where quite a number of morbid ideas can be demonstrated, there may be an insurmountable difficulty in attempting to trace the act to any of them, though it may be their direct outcome; for it is not always possible for the healthy mind to find its way through the labyrinth of the

diseased brain or to reproduce its psychological processes, and a connection not apparent to a sane person, nor even conceivable by him, may yet exist in the head of the madman. This being so, it ought to be presumed, as a matter of principle, at any rate in the case of any lunatic whose mental constitution is changed by disease to such an extent that he can be proved to have lost the power of discrimination between right and wrong, either in general or in a certain number of directions, that every one of his acts which is not merely a manifestation of inveterate mental habit, but requires an actual exercise of intellectual function, is influenced by such morbid ignorance. In claiming this, I merely repeat the postulate of Erskine, who, in his defence of Hadfield, said: "Where the connection is doubtful, the judgment should certainly be most indulgent from the great difficulty of diving into the secret sources of a diseased mind."

I now come to the bugbear of the English law of insanity, the lucid interval. "Even in the case of an acknowledged lunatic," it is said, "the offence is presumed to have been committed in a lucid interval, unless the contrary be shown." Now lucid intervals do occur, but they are very rare, and the prominence which they are accorded in our law is out of all proportion to their medical importance. To understand the meaning of the term, we must first distinguish the lucid interval from a remission and an intermission, though the former expression is sometimes used in a lax way so as to include the latter two classes of phenomena. By a remission we mean a mere diminution in the intensity of the morbid process: the manifestations of mental disorder are still there, but they are less pronounced and perhaps hardly discernible to the untrained eye; after an interval, varying in duration from a few hours to several days, the disease again gains ground and resumes its ordinary course. An intermission differs from a remission both in duration and in degree: it may last a few days, some weeks, a month, or even longer; and the subsidence of the morbid phenomena is more complete than in the case of remissions; the illness has quieted down, but it is not gone;

its constituent elements are not well marked, sometimes but faintly discoverable; yet they are always ready to burst forth with full vehemence, at least in a transitory fashion, whenever favourable conditions present themselves. A lucid interval, on the other hand, is not, as the French Chancellor d'Agnessau well remarks, "a mere apparent calm, a mere shadow of rest, but on the contrary, a profound quiet; not a mere ray of reason which renders the darkness all the more striking when it has again disappeared." "The lucid interval consists in a complete, though temporary, cessation of the manifestations and indications of mental disease. It is a real truce, a loyal armistice." (Legrand du Saulle.) Here the symptoms of *active* mental disease are indeed, for the time being, completely gone. It is true the patient is not the same man he was before becoming the victim of insanity, and after a few attacks he is sure to exhibit profound changes in his psychical personality; but he has so far recovered as to be able correctly to think, feel, and act. Lucid intervals may last up to six months or even longer. It is in this strict sense that the English law understands the term: "By a lucid interval is not meant a concealment of delusions, but their total absence, their non-existence in all circumstances, a recovery from disease and subsequent relapse." (*Waring* v. *Waring*.) Now whilst remissions and intermissions are of very frequent occurrence and may be met with in most forms of mental disease, even in those which, on the whole, follow a gradual downward course, lucid intervals are not often observed and belong to but a few types of insanity. The purest forms are seen in *folie circulaire* and in recurrent mania, both classes of disorder being characterised by a certain periodicity. Lucid interval, in fact, connotes recurrent insanity, and I do not know whence Dixon Mann derives his information when he tells us that in our law "recurrent insanity may be pleaded as a bar to criminal responsibility, and if the plea is sustained, the death penalty is not inflicted even when the murder is committed in what lawyers term a lucid interval." There can, at least in theory,

be no doubt that, for an act proved to have been committed during a genuine lucid interval, the prisoner ought to be made responsible, and he ought to be awarded the ordinary punishment provided for the crime, not a lighter one, as some of the older codes absurdly enough prescribed. But lucid intervals being not the rule, but a rare exception, it is certainly not in accordance with common sense to presume their existence at the time of the act in the case of lunatics. Besides, there are reasons which render it extremely difficult to give effect to lucid intervals in the practice of the criminal tribunals. In very many instances it is quite impossible for the medical expert to ascertain whether there was a true lucid interval at the time when the deed was done. Often no amount of skill, experience and investigation will enable him to decide whether there was not, after all, but a remission or intermission, and Sir John Nicoll hit the nail on the head when he says: "The proof of a lucid interval is a matter of extreme difficulty, as the court has often had occasion to observe; and for this, among other reasons, namely that the patient so affected is not infrequently rational to all outward appearances, without any real abatement of his malady; so that, in truth and substance, he is just as insane in his apparently rational intervals as he is in his visible raving fits." Nor must it be forgotten that even where there are lucid intervals genuine enough, the gradual subsidence of the paroxysm and the gradual onset of a new one frequently forbid us to say whether, at the exact moment of the act, mental health was completely established. Upon all these grounds the more modern codes have omitted all mention of lucid intervals; and so in the United States the principle strikes root that "where previous insanity is proved, the prosecution must show that the crime was committed during a lucid interval." (*The People* v. *Montgomery*, 13 Abb. Pr. (N.S.) 207.) If we remember on the one hand how protracted is usually the course of mental disorders, that the duration of even most of those forms which are in insanity called acute diseases, is to be reckoned by months, maybe

many months, and on the other hand that lucid intervals are of rare occurrence and only observed within a limited range of morbid types, it will be apparent that lunacy is pre-eminently one of those subjects in respect of which that presumption of fact which has been called the presumption of the continuance of a state of things, might well be raised into a presumption of law; and instead of holding that *primâ facie* a lunatic is to be taken as having acted during a lucid interval, very strong proof indeed should be required that it was during a lucid interval one proved to be mad committed the crime. We can in fact not do better than adopt the wisdom of the Roman law, the principle of which is contained in the following dicta: "Semel furiosus semper praesumitur furiosus, et contrarium tenenti incumbit onus probandi sanam mentem" (P. Zacchia, Quaestiones, lib. II. tit. I. 23), and "Si dubitatur quo tempore delinquerit, an tempore furoris, an sanae mentis, dicendum est quod delinquerit tempore furoris." (Farinacius, Quaest. 98. 8.)

CHAPTER XVII.

LUNACY EXPERTS.

"Quam multa sint, quae circa hanc materiam de dementia a medicis requirere jurisconsulti consuescant, notius ipsis est, quam ut a me longioribus demonstrari possit; cum enim has passiones soli medici cognoscant, ut nobis notum est, et ipsi quoque fatentur."

Zacchia, Quaest., lib. ii. tit. i. q. 1. 1.

"Paria sunt, medicum non adhibere, aut adhibere imperitum."

Ibid., lib. v. tit. ii. q. 3. 11.

THE members of the legal and medical professions in this country have long been at daggers drawn over the rules which determine the criminal responsibility of lunatics and alleged lunatics. Nor has the antagonism been limited to the principles of substantive law involved: on the contrary, our procedure and practice in cases where the defence of insanity is set up, have been attacked with equal violence. "From time to time medical writers have expressed opinions, not always in moderate and courteous terms, very adverse to the methods by which trials are conducted in which the plea of insanity is raised, and calling High Heaven to witness to the blood-guiltiness of those who permit such a state of things to continue." (Mercier.) These criticisms have borne fruit in a series of suggested schemes of reform, the number of which has been further swelled by proposals emanating from the pen of lawyers. The prevailing notion underlying all of them is that the ordinary tribunal is quite unfit "to try questions of sanity and insanity." Some authorities demand that criminal courts should borrow the machinery of the King's Bench and Admiralty Divisions for the determination of issues requiring scientific investigation, and that prisoners who plead lunacy should be tried, not by judge and jury, but by a judge with medical assessors. Another plan is to send all cases raising questions of insanity

before a special tribunal composed of a permanent commissioner who may be either a medical man or a lawyer, and a jury selected according to certain educational qualifications and always containing *inter alios* an equal number of members of those two professions; the verdict of the majority of the jury, created where necessary by the casting vote of the permanent commissioner, to be the finding of the court. Others again wish to sever the question of mental health from the general question: Did the prisoner, as a matter of fact, commit the specific act charged? And whilst the latter is to be determined by the ordinary criminal courts in the ordinary way, the former is either to be investigated by a special tribunal presided over by a judge "who is a lawyer of eminence and who has also studied lunacy" and who is to try the issue of insanity with a common jury, or, as has been recommended by Wharton, is to be left entirely in the hands of experts who are to give their decision after a prolonged observation of the accused. I do not think it necessary to criticise these schemes in detail; for there is one objection fatal to all of them, viz. that the immediate issue, the real subject of inquiry, where the defence of insanity is set up in criminal trials, is not insanity, but criminal responsibility; and criminal responsibility being a purely legal notion, the determination of questions relating to it belongs to the province of law, not of medical science.

I cannot help feeling that those writers, legal and medical, who attempt to revolutionise the organisation of our courts for the trial of lunatics or alleged lunatics accused of crime, are beginning at the wrong end. The part of our system of criminal procedure which, more than any other, stands in urgent need of reform is the mode in which medical evidence as to the accused person's state of mind is obtained. Much, indeed, of what appears unsatisfactory in such trials is due to the inherent difficulties of the subject of inquiry and to the limits and imperfections of mental medicine in its present state. But I make bold to assert that the practice, peculiar to Anglo-Saxon jurisprudence, of allowing experts in criminal

trials to be instructed by, and to be called on behalf of, the parties, lies at the root of practically all the avoidable evils of which such trials are productive. The only qualification required in this country of an alienist expert is that he must be on the medical register. Now it is quite possible for a medical man to have passed through his curriculum and through the examinations which have landed him on that coveted shore, without having seen a single case of mental disease. And whilst it has been held that a witness whose knowledge of foreign law is derived solely from study, unsupplemented by practice, is incompetent to give expert evidence on such foreign law, nothing but his own conscience will prevent such a medico from posing as a witness skilled in lunacy. That the value of the testimony of such a one is nil goes without saying; yet when his opinion is matched against that of an alienist who has made insanity his life study, the jury has no measure by which to ascertain the relative weight to be attached to these two opinions and can do little more than look puzzled in the face of what is called conflicting medical evidence. The possibility that the expert may perchance be a man whose judgment is unobscured by any knowledge of the subject on which he is to testify, is perhaps the greatest, but certainly not the only, fault inherent in our system. In the trial of a man called Andrews (1868), Chief-Justice Chapman of Massachusetts made the remark which unfortunately is correct, that "experts can be found to testify to any theory, however absurd." Nor can we wonder that this should be so. Counsel in this country has a list of from thirty thousand to forty thousand names to choose from, and it would be strange indeed if faddists of every shade and description were not represented among so numerous a body of men. Physicians holding strange and heterodox views are usually well known inside, and often outside, the profession, and the advocate who has to establish some extravagant theory favourable to his client, will make it his business to search out and summon those medical men whose peculiar views suit the

emergencies of the case. And they are summoned alone. "The great mass of experts, comprising ninety-nine per cent. of the entire body, are left uncalled. Now to speak of the opinions of such special experts as the opinion of experts in general . . . is about as reasonable, as it would be to speak of the arguments of counsel, employed to argue on a series of isolated cases, as constituting the law of the land." (Wharton and Stillé.) Besides, an expert called on behalf of the parties, is exposed to a constant temptation to become a partisan; this is particularly true of the physicians summoned by the defence. For, swayed by charitable impulses, they are prone to attribute to a prisoner who they think ought not to be punished, a mental state which he does not in truth possess, in order to bring him within the legal rule of immunity: hard facts are molten down in the crucible of mercy, and opinions shaped in the elastic mould of human sympathy if, by the exercise of such craft, the rope tightening round the neck of the wretch in the dock can be uncoiled. And the risk of partisanship is a snare and a pitfall against which even the best type of expert is not always proof; for much of it comes unintentionally and unawares. "We all know well," observes Dr. Samuel Knaggs, "how apt the mind is to pounce and dwell upon the favourable arguments which can be arrayed upon the side on which it is engaged, till from continued attention they are invested with undue importance, whilst strong and cogent reasons on the other side, repelled possibly in the first instance from a sense of their real force, are retained in the background or lost sight of, perhaps involuntarily, when they ought to have stood prominently forward." And "the moment the medical men take sides, they are useless, and the case must be decided without them. . . . The witness, then, speaks from instructions,—not as a witness, but as an advocate, and a bad one too." (Harris.) Nay, the bare supposition that the expert's scientific knowledge is intended to be used for the advantage of either side, must materially diminish the weight which his opinions ought to carry. Moreover, whilst the rich malefactor has the

means of pressing into the service of the defence any number of prominent alienists, men sure to discover every single symptom in his mental condition that makes for irresponsibility, it may occur that a poor prisoner who fully comes up to the law's standard of immunity, is condemned merely because the aid of an experienced alienist cannot be got. And, finally, as long as the practice of calling scientific witnesses on behalf of the parties is continued, their opinion cannot reach the jury but in the form of answers given to questions put on examination-in-chief, cross-examination, and re-examination. It does not always suit counsel's purposes that the whole truth is elicited: a skilful advocate will manage to shape his questions in such a way that only so much is disclosed as will benefit his client; the expert has no opportunity of expressing the whole of his views, and a partial statement of truth is bound to mislead the jury. Quite apart from such design, where the medical testimony is contained in a string of questions and answers, not necessarily connected by any logical tie, the herculean task is imposed upon the jury of reconstructing out of such isolated fragments a true image of the prisoner's mental condition, and considering that the problem is often a very knotty one and that the jurymen come to it without any previous training, we cannot wonder that sometimes their best efforts are not crowned with success.

Such being the defects inseparable from the English practice, it is a matter of surprise that it has not long since been given up in favour of the continental system under which the experts are appointed by the state and called in behalf of the court. And what is even more astonishing, is the fact that a demand for such a reform is not constantly and incessantly expressed from the bench. Judges indeed are fully alive to the unsatisfactory nature of scientific evidence in this country, and many of them have not made the least secret of their utter want of confidence in medical testimony. But, as far as I know, the only judicial voice thus far raised in favour of the adoption of the continental plan, is that of Judge Edge who, in 1904, at

Clerkenwell Sessions, said: "I have no faith in expert evidence called by the parties. They might be the best of experts, but their statements are usually as wide as the poles asunder. I wish the rule here were the same as in Germany, where no expert evidence is allowed except that provided by the Court." Yet it is only by a change in this direction that an improvement can be expected. It is not, however, enough that experts should be instructed *ad hoc* by the court in each individual case separately; they ought to form a permanent professional body, attached to the courts in an official capacity, such as the 'Gerichtsaerzte' in Germany or the 'experts médecins près les tribunaux' in France, and composed of men who by training and experience are specially qualified to discharge the important duties of medical experts. "Forensic psychological medicine," say Messrs. Wharton and Stillé, "is a speciality, and an expert in this speciality must be skilled in three departments of science:

"(1) Law sufficient to determine what is the responsibility which is to be the object of the contested capacity;

"(2) Psychology, so as to be able to speak analytically as to the properties of the human mind;

"(3) Medicine, so far as concerns the treatment of the insane, so as to speak inductively on the same subject.

"If either of these factors is wanting, a witness cannot be technically an expert." Whilst I am not prepared to subscribe to every word in this definition of the qualifications of a lunacy expert, I think it gives a fair idea of the kind of knowledge required of such a one, and it will hardly be denied that the average medical practitioner is sadly wanting in such knowledge. At any rate, a thorough mastery of forensic medicine must be expected of a forensic expert; and as long as the practice prevailing in some at least of the medical schools is continued of entrusting the teaching of that subject to a junior member of the hospital staff unacquainted with even the rudiments of the law and therefore incapable of grasping the legal side of the science in which he is to impart instruction to others, erroneous views will be disseminated broadcast through

the ranks of the medical profession. And when a medical witness whose notions of medical jurisprudence are of the feeblest character, lays down the law to the bench with the firmness of conviction born of ignorance, it cannot be surprising if the 'expert' is occasionally treated with scant respect by the judge. These sneers from the bench and the feelings of bitter resentment which they are sure to excite in the breasts of the whole medical fraternity, would alike vanish, if only *bonâ fide* specialists in medical jurisprudence, *i.e.* men equally familiar with the legal and medical aspects of the questions in respect of which they are to testify, were appointed and allowed to give expert evidence. Men holding eccentric and exceptional views would stand no chance of being chosen for the office, and the testimony of those holding it would be likely to reflect the best scientific teaching of the age, and be representative of the average opinions current in the general body of the profession. Not called upon to serve the ends of either party, they would, as a matter of course, practice that scientific self-restraint which would make expert evidence a hundred-fold more valuable than it is now, and they would never hesitate to confess to a 'Non liquet' where the data of their science do not enable them to pass any judgment at all. Moreover, the regular attendance at the courts would soon render such an expert familiar with the rules of evidence, and enable him to distinguish between relevancy and irrelevancy; being armed with such knowledge, and being summoned as *amicus curiae*, not as a witness for either prosecution or defence, there would be no earthly reason why he should not be permitted to give his evidence in the manner which he himself thinks will most clearly and accurately convey his ideas and conclusions. I need not dilate upon the enormous advantages which would accrue to the administration of criminal justice, if judge and jury were thus given a connected, and at the same time unprejudiced, account, logically arranged, of the mental state of the prisoner, instead of the scraps of information with which, under the present system of question and answer, they have

to be contented. Counsel should of course be at liberty to formulate any questions tending further to elucidate the facts and opinions to which the expert has deposed, but I believe it would be best if the judge were made the mouthpiece for all such additional questions.

Another very grave defect in our system of procedure are the very meagre opportunities which it affords for the investigation of the mental condition of an accused person. "The scandal," justly complains Dr. Blandford, "which has come upon evidence given in doubtful cases of insanity has arisen from medical men giving their opinions after an amount of knowledge and examination which in no degree warranted any opinion at all." A few visits, even long ones, to the prison in which the accused is detained, do not, in obscure cases, suffice to enable the most experienced alienist to arrive at a satisfactory solution of the problem. The speedy trial forced upon us by the Habeas Corpus Act is no doubt a source of mischief in such cases. But quite apart from that, the surroundings in which the investigation has to be carried out are particularly unfavourable, and in themselves place great obstacles in the way of the medical expert: prison is not the ideal place for a psychiatrical inquiry. Professor Siemerling points out that two important aids to diagnosis are here wanting: the watchful eye of the trained attendant and the opportunity for the medical observer to study the conduct of the individual who is the subject of investigation, in his intercourse with others. In this respect we have something to learn from Germany where the Code of Criminal Procedure provides in Paragr. 81 that "for the purposes of a more thorough investigation of the mental state of an accused person, the court may order, at the instance of a medical expert, and after hearing counsel for the defence, that the prisoner be sent to and detained in a public lunatic asylum. . . . The period of detention in the asylum must not exceed six weeks." This provision, or a similar one, might be adopted with advantage in this country; a ward specially reserved for such cases in Broadmoor would in all probability admirably answer the purpose.

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